TUN DATU HAJI MUSTAPHA BIN DATU HARUN v. TUN DATUK HAJI MOHAMED ADNAN ROBERT, YANG DI-PERTUA NEGERI SABAH & DATUK JOSEPH PAIRIN KITINGAN (No. 2)

[O.C.J. (Tan Chiaw Thong J.) April 15, 1986]

[Kota Kinabalu – Suit No. K. 467 of 1985]

Constitutional Law – Appointment of plaintiff as Chief Minister – Whether appointment was valid – Effect of swearing in – Whether administering of oath sufficient to constitute valid and complete appointment – Whether letter of appointment is required – Whether nominated members can be taken into account in making an appointment of Chief Minister – Revocation of appointment of Chief Minister – Whether ultra vires the State Constitution – Appointment of second defendant as Chief Minister – Whether valid – Whether notification in Gazette conclusive evidence of valid appointment – Conclusive evidence – Chief Minister (Incorporation) Ordinance (Sabah Cap. 23), s.5 – Constitutional interpretation – Role of conventions as aid to interpretation – Sabah Constitution, art. 6(3) – Federal Constitution, art. 43(1).

Constitutional Law – Chief Minister – Appointment – Requirement of – Federal Constitution, art. 43(1).

Evidence – Burden of proof – Allegation of fabrication of evidence – Criminal Law standard of proof – Presumptions – Conclusive evidence – Chief Minister (Incorporation) Ordinance (Sabah Cap. 23), s.5 – Evidence Act 1950, s. 114.

Interpretation – Constitutional interpretation – Role of conventions as an aid to interpretation – Revocation of Chief Minister's appointment – Whether ultra vires State Constitution – Interpretation and General Clauses Enactment, 1963, s.29(3).

At about 5.30 a.m. on the morning of April 22, 1985, after the State elections in Sabah, the plaintiff took the prescribed oath of office of a Chief Minister before the first defendant. The same day the first defendant purported to revoke the appointment as Chief Minister of the plaintiff. At about 8.00 p.m. the same day, the first defendant appointed and swore in the second defendant as Chief Minister.

The plaintiff sued for a declaration that the first defendant's revocation of the plaintiff's appointment as Chief Minister and the appointment of the second defendant as the Chief Minister were *ultra vires* the Constitution of Sabah. The plaintiff also claimed an injunction to restrain the second defendant from exercising the powers of the Chief Minister.

The main issues before the Court were:

1. Whether the alleged appointment of plaintiff as Chief Minister should be an issue to be considered by the Court?

2. Whether there was such an appointment and, if so, whether it was a valid one? In this respect it was necessary to consider the following:

(i) Which party has the evidential burden to prove that there was or was not a valid appointment?

(ii) Did plaintiff enter the Istana on the invitation of the first defendant or was there a conspiracy to effect plaintiff's entry?

(iii) Did first defendant decide to appoint plaintiff as Chief Minister before the latter's arrival?

(iv) Did the circumstances under which the plaintiff was sworn in allow the Yang di-Pertua Negeri to make his judgment quietly, independently and in a dignified manner as intended by the Constitution?

(v) Was there duress in securing the appointment of the plaintiff?

3. Whether the swearing in of plaintiff by first defendant was valid in law?

4. Whether the taking of the oath is sufficient to constitute a valid and complete appointment or whether a letter of appointment is required?

5. Is the Yang di-Pertua Negeri's discretion to appoint a Chief Minister under Article 6(3) of the Sabah Constitution reviewable by the Courts?

6. Can nominated members be taken into account in making an appointment under Article 6(3)?

7. Can the legal appointment of a Chief Minister be validly terminated by the Yang di-Pertua Negeri?

8. Was the subsequent appointment of the second defendant as Chief Minister valid in law? And was it made willingly, voluntarily and freely, without any influence, pressure or threat from anyone?

9. Is notification in the *Gazette* of the appointment of the Chief Minister conclusive evidence of the appointment?

Held: (1) the matter of the alleged appointment of plaintiff as Chief Minister was an issue to be tried;

(2) the defendants being the party to begin, the evidential burden lies upon them to prove that there was no, or no valid, appointment;

(3) on the whole of the evidence and bearing in mind the burden of proof and on the evidence as accepted by the court, the plaintiff did not enter the Istana on the invitation or with the permission of the 1st defendant;

(4) after considering the whole of the evidence and on the evidence as accepted by the court and bearing in mind the burden of proof, the 1st defendant did not decide to appoint the plaintiff as Chief Minister before the latter's arrival;

(5) on the evidence as accepted by the court, the 1st defendant in swearing in the plaintiff as Chief Minister did not exercise his judgment under the Sabah Constitution in that –

(a) he did not take into account the post-election position of PBS as he was waiting for the official election results to be declared. In other words, the first defendant, contrary to what he was required to do under Article 6(1) of the Sabah Constitution, did not take into account the actual number of elected seats won by PBS because he was at all material times waiting for official results to be announced;

(b) such a swearing in was made solely as a result cumulatively of the pressure and threat operating on his mind

and when he was frightened and confused in mind and tired physically and when he was unable to think properly;

(6) in swearing in the plaintiff in the circumstances as found by the court, the 1st defendant has made no judgment under Article 6(3) of the Sabah Constitution. Accordingly such swearing in is null, void and no legal effect;

(7) on the assumption that the court is wrong in holding that the swearing in is null, void and of no legal effect and that the taking of the oath is sufficient to constitute an appointment, it is necessary to consider whether it was vitiated by duress, as pleaded by the defence. On the evidence in this case, the defendants have not succeeded in proving the defence of duress, as pleaded by them;

(8) taking all the relevant evidence into consideration, the appointment of 2nd defendant by the 1st defendant was made willingly, voluntarily and freely, without any influence, pressure and threat from anyone;

(9) when the 2nd defendant drafted the letter of revocation of the appointment of the plaintiff, he did so under the impression that the 1st defendant had appointed the plaintiff as Chief Minister. 2nd defendant did not seek confirmation from the 1st defendant nor was he told by the latter that that was in fact so;

(10) the termination of the appointment of a Chief Minister by a letter of revocation is not valid;

(11) there was sufficient cogent evidence in this case to conclude that there was a conspiracy to effect the entry of the plaintiff to the Istana and to have him appointed as Chief Minister and that 1st defendant was to be persuaded to do so;

(12) bearing in mind the relevant principles regarding the proper approach to the interpretation of constitutions and the importance of the subject of the appointment, as well as the tradition and usage pertaining to the appointment of a Chief Minister and despite the absence of express provision in the Sabah Constitution, a signed and sealed instrument is constitutionally required for the appointment as Chief Minister;

(13) the taking of the oath by the plaintiff without a signed and sealed instrument of appointment does not suffice to constitute an appointment of Chief Minister under Article 6(3) of the Sabah Constitution. It follows that there has been no valid appointment of the plaintiff made thereunder;

(14) the "conclusive evidence" in section 5 of the Chief Minister (Incorporation) Ordinance, refers to the fact, together with any procedural requirements, of the appointment as distinct from the conclusiveness of the appointment itself so as to bar any challenge of the legality of the appointment;

(15) in a case where the appointment of a Chief Minister has been validly made, there is no power for the Head of State to either revoke such an appointment or to dismiss the Chief Minister;

(16) any constitutional convention under a wholly elected legislature is not a convention of which the court can take judicial notice, so as to recognise its existence as an aid for and background to the interpretation of the relevant provisions of the Sabah Constitution.

(17) the Head of State may not constitutionally take into account any nominated member for the purpose of making his judgment in the choice of a Chief Minister; nor can he constitutionally take any of them into consideration for the purpose of inflating the seats of a party having a minority of elected seats, in order to secure a majority over the party with the majority of elected seats. If he does so, such a judgment would not be in accordance with the requirements of Article 6(3) of the Sabah Constitution.

Semble: (i) where a witness has been found to be not telling the truth on certain matters, it does not necessarily follow that that would be so in respect of other matters which have to be independently and separately considered;

(ii) whether evidence has been fabricated for the purpose of these proceedings is a matter that requires a standard of proof which is that of a criminal standard of proof beyond any reasonable doubt.

Cases referred to:

(1) *State of Rajasthan* v. *Union of India* A.I.R. 1977 S.C. 1361.
(2) *Council of Civil Service Unions* v. *Minister for Civil Service* [1985] A.C. 374.
(3) *Universe Tankships Incorporated of Monravia* v. *I.T.F.* [1983] 1 A.C. 366.
(4) *Hussein* v. *Hussein* [1938] P. 159; [1938] 2 All E.R. 344.
(5) *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli* [1966] 2 M.L.J. 187.
(6) *Adegbenro* v. *Akintola & Aderemi* [1963] 3 W.L.R. 63.
(7) *Dato Menteri Othman bin Baginda* v. *Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 M.L.J. 29.
(8) *Attorney General of St. Christopher, Nevis & Anguilla* v. *Reynolds* [1979] 3 All E.R. 129, 136.
(9) *Minister of Home Affairs* v. *Fisher* [1980] A.C. 319, 329.
(10) *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64, 70; [1981] A.C. 648, 670.
(11) *Thomas* v. *A.G. of Trinidad and Tobago* [1981] 3 W.L.R. 601.
(12) *A.G. of the Commonwealth ex relatione McKinlay* v. *The Commonwealth of Australia* (1975) 135 C.L.R. 1, 17; 7 A.L.R. 593.
(13) *Reference Re Amendment of the Constitution of Canada* (1982) 125 D.L.R. (3d) 1.

CIVIL SUIT.

Raymond Kindwell, Q.C. (*G. Sri Ram* and *Abdul Razak Rouse* with him) for the plaintiff.

Anthony Lester, Q.C. (*Josie D. Bosi*, Ag. State Attorney, Sabah, and *Dominic Puthucheary* and *Philip Koh* with him) for the defendants.

Cur. Adv. Vult.

Tan Chiaw Thong J. (read by Mrs. Agnes Wong Kiew Ling, Registrar): In this action, the plaintiff claims the following reliefs against the defendants:

(a) a declaration that the first defendant's revocation of the plaintiff's appointment as Chief Minister on April 22, 1985 is *ultra vires* the Constitution, null and void and of no effect;

(b) a declaration that plaintiff is the Chief Minister of the State of Sabah;

(c) a declaration that the first defendant's act in appointing the second defendant as the Chief Minister of Sabah on April 22, 1985 is *ultra vires* the Constitution, null and void and of no effect;

(d) an injunction to restrain the second defendant from exercising the powers of and/or acting as the Chief Minister of the State of Sabah;

(e) a declaration that the act of the first defendant in appointing the State Cabinet is *ultra vires* the Constitution, null and void and of no effect;

(f) a declaration that the act of the first defendant in appointing the nominated members of the Assembly is *ultra vires* the Constitution, null and void and of no effect;

(g) a declaration that all acts and things done by the second defendant in his pretended exercise of his powers as Chief Minister are null and void and of no effect;

(h) costs of this suit;

(i) further or other relief.

At about 5.30 a.m. on April 22, 1985, the plaintiff took and subscribed on oath in the form prescribed for a Chief Minister for the State of Sabah, before the 1st defendant. The same day, the 1st defendant purported to revoke the appointment. as Chief Minister of the plaintiff. At about 8.00 p.m. the same day, the 1st defendant appointed and swore in the 2nd defendant as Chief Minister, which appointment is a main issue.

After hearing argument, the Court allowed the application of learned leading counsel for the defendants (LCD) to amend the pleadings of the defendants by incorporating, as part of the defendants' pleadings, written relevant legal principles relied upon by the defendants. This was later supplemented by a written "Further legal submissions on behalf of the defendants", including Part (E) thereof, on application made.

At the outset, I would like to mention one matter, and it relates to whether the alleged appointment of plaintiff as Chief Minister should be an issue to be considered by the Court. The case for the plaintiff, based on his pleadings, is that there having been an appointment, the sole issue is whether the purported revocation of his appointment is valid. The defendants contend otherwise. In the light of the existing pleadings, which have been amended since the judgment on the preliminary point taken by the defendants on jurisdiction, I am of the view that the matter of the alleged appointment of plaintiff as Chief Minister is an issue to be tried.

Para. 3 of the Statement of Claim states:

> "On April 22, 1985, the first defendant acting under the provisions of Article 6(3) of the Constitution, appointed the plaintiff as Chief Minister."

Paragraphs 2 and 2A of the re-amended Statement of Defence of the 1st defendant respectively allege:

> "2. The 1st defendant in reply to paragraph 3 of the Statement of Claim states that the plaintiff was never appointed as Chief Minister of Sabah under Article 6(3) of the Constitution of the State of Sabah as claimed.
>
> 2A. The plaintiff was not appointed on April 22, 1985 and all other defences in this Amended Statement of Defence are in the alternative."

This brings in issue the question of whether there was an appointment, and if so, whether it is a valid one, with the reservation that it is common ground that how the 1st defendant exercised his discretion and the matters and factors which he took into account, in making an appointment under Article 6(3) of the Sabah State Constitution are non-reviewable. In this connection, I think it is pertinent to observe that, the defendants being the party to begin, the evidential burden lies upon them to prove that there was no, or no valid, appointment.

It was agreed by the parties that the defendants should begin first, and this was done. At the end of the case for the defendants, learned leading counsel for the plaintiff (LCP) submitted that there is no case for the plaintiff to answer, and elected to call evidence only on the one issue as to whether the 1st defendant gave permission for the plaintiff to enter the Istana.

I am deeply indebted to both leading counsel for the parties for presenting their respective submissions in writing.

I have fully considered the submission of no case to answer by LCP in the light of the pleadings

and the evidence called by the defendants. For the reasons which will appear in this judgment, I rule that there is a case for the plaintiff to answer. My judgment is therefore intended to cover this aspect of this action, as well as the action as a whole.

As certain allegations of misconduct, including allegations of conspiracy and threatening behaviour, have been made by the defendants against certain persons, including the witnesses called by the plaintiff, I bear in mind the burden of proof placed on the defendants: that the more serious the allegation, the higher degree of probability and the more cogent the evidence, are required. As to the allegation of fabrication of evidence by Haji Mandalam bin Marziman (P.W.1) and Constable Ali Hassan bin Muyong (P.W.4), this requires a criminal standard of proof, that is, proof beyond any reasonable doubt.

I propose to deal with the evidence under several headings as follows, to be followed by my judgment on specific legal issues:–

I(a) Did plaintiff enter the Istana on the invitation or with the permission of 1st defendant?

(b) Did 1st defendant decide to appoint plaintiff as Chief Minister before the latter's arrival?

II Circumstances under which plaintiff was sworn in by 1st defendant, and whether swearing in has legal effect.

III Circumstances under which 2nd defendant was allegedly appointed as Chief Minister; and whether the alleged appointment is legal and valid.

I(a) *Did plaintiff enter the Istana on the invitation or with the permission of 1st defendant.*

It is common ground that plaintiff entered the Istana at about 3.40 a.m. on April 22, 1985 in a Trooper vehicle, led by a car numbered CPS 203 used by the close escort of the former Chief Minister Datuk Harris Mohamad Salleh (Datuk Harris). It is the case for the defendants that the entry was not at the invitation nor with the permission of the 1st defendant. It is the case for the plaintiff that it was.

The evidence of 1st defendant (D.W.1) was to the effect that he never invited plaintiff, nor gave permission to the plaintiff, to come to the Istana. He related how, at about midnight, he received a telephone call from a former State Minister, Lim Guan Sing, followed by another one about 15 minutes later, asking or advising him not to let in anyone to the Istana. He was surprised. At about 2.15 a.m., his ADC Haji Mandalam bin Marziman (P.W.1) informed him that the personal assistant to Datuk Harris telephoned to say that the last-named wanted to come to the Istana to see him; whereupon he gave instruction to P.W.1 that only Datuk Harris and his bodyguard were allowed entry to see him. Being dressed in sarong and baju Melayu then, he went up to change into a batik shirt and long trousers. He went downstairs again, and met his private secretary at the corridor between the latter's office and his own. He was surprised to see the latter in a necktie, without a coat. D.W.1 went upstairs and changed into a bush jacket and brought with him a revolver and a talismanic kris. At this stage, I would mention that, on the evidence, nothing much turns on these two weapons. D.W.1 stated that after he met the private secretary, he had the intuition that something might happen.

D.W.1 said that when he went into his office, with the intention of seeing Datuk Harris, he was surprised and taken aback on seeing the State Secretary Tan Sri Hamid Egoh (D.W.7) and the State Attorney, Datuk Nicholas Fung (D.W.2). He asked them, "What is this", and they replied that they were asked to come to the Istana to arrange for the appointment of plaintiff as the Chief Minister. He said: "Mana boleh" (how can it be); and one or both of the other two witnesses said: "Memang tidak boleh" (of course cannot). While still discussing with D.W.2 and D.W.7 about what was to be done and the reason why they came to the Istana, plaintiff and a number of other persons arrived and entered his office without his permission. He asked D.W.2 and D.W.7 to go to the private secretary's office. He then had some casual conversation with plaintiff in his office, having known the latter well for a long time, since about 1967. According to the evidence of D.W.1, he did not invite, nor give permission to, plaintiff to enter the Istana.

It was suggested to D.W.1 in cross-examination that, between 2.00 a.m. and 2.30 a.m. Datuk Harris telephoned him on his private line and told him: "Tun, I am sorry to tell you that we have lost this election. Tun Mustapha's representative called to seek our support and I have agreed." This was denied by D.W.1, who also denied that he replied: "Alright or O.K. If that is the case I'll make arrangements to call and swear in Tun Mustapha." He also denied that the suggestion to call in Tun

Mustapha came from him, and not from Datuk Harris; and also that Datuk Harris then said to him: "The decision is up to you" or "It is up to you to make the decision." I would observe that, if the alleged conversation did take place, which was denied by D.W.1, it seems remarkable and surprising that Datuk Harris has not given any evidence about it. It would clearly have been strong evidence for the plaintiff to show that plaintiff has been invited to the Istana by D.W.1 to be sworn in. Viewed in the light of the rest of the evidence, the very nature of the allegations seems incredible, for they clearly suggest that, at a time when, without any evidence being shown that D.W.1 knew the final results of the general election, and upon such flimsy information given by Datuk Harris, D.W.1 took it upon himself to make arrangements to swear in plaintiff. I have no hesitation in believing D.W.1 and finding that there was no such conversation.

It was put to D.W.1 that he instructed Ahmad Jalil, then protocol officer at the Istana, to telephone plaintiff at his house at between 3.00 a.m. and 3.15 a.m. and invite the latter to come to the Istana to be sworn in as Chief Minister. This was in effect denied by D.W.1. If what was put to D.W.1 was true, it would again clearly have been strong evidence for plaintiff, showing that D.W.1 had invited the latter to the Istana to be sworn in. At the time P.W.1, P.W.3 and P.W.4 were called to give evidence for the plaintiff, Ahmad Jalil had also been transferred from the Istana, and it is not known why he was not called to give this important piece of evidence for plaintiff. In the circumstances, considering the denial or non-admission of D.W.1 of the allegation put, I believe him and find that the allegation has no substance. Indeed, in the circumstances, I would go further and hold that the presumption under section 114(g) of the Evidence Act, 1950, applies against plaintiff.

A series of questions were put to D.W.1 on an alleged conversation between him and Dr. Ya'acob Merican when the latter came to the Istana on the afternoon of April 22, 1985. I find, on the evidence given by Tan Sri Hamid Egoh (D.W.7) which I accept, that Dr. Merican came on the instructions of Datuk Harris. It was also alleged that Dr. Merican came to the Istana on invitation. The alleged conversation, if proved to be true, would indicate that D.W.1 told Dr. Merican that he had appointed plaintiff; had shown a letter from 2nd defendant to Dr. Merican; and had asked the latter for advice as to whether it was legally possible to have plaintiff removed from his appointment. The allegations were denied by D.W.1, and Dr. Merican has given no evidence to substantiate the allegations. Indeed, on the evidence of Datuk Nicholas Fung (D.W.2), which I accept, any conversation regarding any matter relating to the allegations put to D.W.1 was probably, to say the least, with D.W.2 and not with D.W.1. I find on the evidence that Dr. Merican was not invited to the Istana, and that no conversation of the nature put to D.W.1 between him and Dr. Merican took place at the Istana on the afternoon of April 22, 1985. I would, in the circumstances, further hold that, in respect of the allegations put, the presumption under section 114(g) of the Evidence Act, 1950, applies against plaintiff.

The evidence of D.W.1 as to the remarks made by him when he met D.W.2 and D.W.7 was corroborated by D.W.2, who testified that, when. D.W.1 saw them, he said: "Apa macam ini" (what is this) or something like that. D.W.2 stated that he remembered this distinctly. Then, after D.W.1 was told why D.W.2 and D.W.7 were there, and D.W.2 informed him that as far as was known, PBS had got 25 of the elected seats; and it would be improper and unconstitutional to appoint Tun Mustapha, to which D.W.7 agreed. D.W.2 stated that D.W.1 said something to this effect: "Ya, lah. Mana boleh, lah." If believed, this, taken with the evidence of D.W.1, would clearly run counter to the view that plaintiff had been invited by D.W.1 to come to the Istana to be sworn in; or had entered the Istana with the permission of D.W.1.

D.W.7 did not give evidence specifically about what was stated in the evidence of D.W.2 above, but he corroborated the evidence of D.W.2 about their telling D.W.1 that PBS had obtained more seats than USNO and Berjaya combined and that, in their opinion, it would be unconstitutional to appoint someone other than PBS, and D.W.7 added that the decision was that of D.W.1. D.W.7 stated that D.W.1 must have said something, but he could not remember. In any event, the evidence of D.W.7 did not contradict that of D.W.1 and D.W.2.

In his evidence-in-chief, D.W.7 stated that, after he learnt that PBS had won 24 seats, at the house of Datuk Harris, the latter told him, "Go to the Istana. We are going to form a coalition. Go to the Istana. TYT is expecting you." If proved, what was alleged by Datuk Harris would be evidence for the plaintiff indicating that D.W.1 had approved of a coalition between USNO and Berjaya and that he was expecting the arrival of

D.W.7. However, the evidence of D.W.1 and D.W.2 and D.W.7 shows otherwise. I have to point out again, that, like the alleged telephone conversation mentioned and dealt with earlier, what was alleged by Datuk Harris against D.W.1 has not been substantiated; Datuk Harris has not given evidence to substantiate the allegation; and no sufficient reason, in my view, has been given for his failing to give evidence to substantiate such allegation. Hence, such allegation, in the circumstances, cannot be accepted and I find that it constitutes no evidence against D.W.1.

In cross-examination, D.W.2 stated that "apa macam ini" meant "What is this" and not "How come". If put as a political question, it could mean "What happened", but he could not read the mind of D.W.1. However, D.W.2 also said that he worked on the assumption of what he was told by Datuk Harris when the latter said: "Go to the Istana. Tun Mustapha is going to be sworn in." He accepted Datuk Harris' statement; and if it was correct, he would expect Tun Mustapha to be at the Istana. On the other hand, D.W.2 did not agree that, if Datuk Harris had been right, what happened at the Istana showed that that was so. It did not appear to him that D.W.1 who was in bush jacket was going to appoint Tun Mustapha. D.W.2 added that, even if plaintiff had turned up uninvited, D.W.1 would still have been courteous to him and offered him biscuits, and to his party as well – and there is evidence to show that D.W.2 had known D.W.1 for some time.

The other two defence witnesses who gave relevant evidence on the entry of plaintiff through the Istana gate were two guards at the gate: Corporal Abdul Rashid (D.W.8) and Constable Faizul bin Zainal Amran (D.W.9).

At the outset, I would state that I find these two witnesses to be entirely honest, impartial and independent witnesses, who gave their respective evidence clearly and honestly. I accept them without any hesitation as witnesses of truth; and I accept their evidence. I have reached this conclusion from observing their demeanour in Court while giving evidence, including the way in which they gave their respective evidence, and after weighing their evidence against the rest of the evidence, particularly the evidence of the plaintiff's witnesses Haji Mandalam bin Marziman (P.W.1), Constable Mohamad Yunus bin Mohamad Yasin (P.W.3) and Constable Ali Hassan Muyong (P.W.4). They were unshaken in cross-examination. I also find that they gave their respective evidence as they remembered it and, where there is any inconsistency or contradiction, it was not deliberate and had arisen through honest mistake; and that any such inconsistency or contradiction had not resulted from giving untrue evidence.

It has been submitted that D.W.8 is an impartial witness, and it was pointed out that he was in dereliction of duty; and he had omitted to record down certain important events in the guard-room diary (Ex. D32). He had admitted in cross-examination that he was unaware that certain persons from the Istana had left or entered the Istana. It was also pointed out that he had broken the rules by allowing Datuk Herman Luping to telephone from the guard-room. I find that D.W.8 had given reasonable explanation for such omissions and lack of awareness; that he was unaware of the happening of such events as he did not witness them or was not subsequently told about them, he being in charge of the gate guards and was not doing sentry duties; or that, by the time he became aware, it was too late to do any recording in Ex. D32, as events subsequent in time had already been recorded therein. As to allowing Datuk Luping to use the guard-room telephone, he had first satisfied himself that it was proper and safe to do so. There is not the slightest evidence to show that the evidence of D.W.8 or D.W.9 was either rehearsed, or that they had had recourse to something to refresh their memory. As rightly observed by LCP, Ex. D32 had been in the custody of the police at Kuala Lumpur until its production in Court.

It is the evidence of D.W.8 that he was in charge of 5 guards at the Istana main gate who were on duty between 7.32 a.m. on April 21, 1985 and 7.42 a.m. on April 22, 1985. D.W.8 testified that he remembered that at 2.40 a.m. on April 22, 1985, he received a telephone call from Acting Sergeant Sunoh Karto, bodyguard to D.W.1; stating that the Chief Minister, whom he understood to be Datuk Harris Salleh, together with Datuk Harris' escort would be coming to the Istana. He was instructed to let them through and to close the gate after that. He recorded the instruction in Ex. D32. This entry appears as Entry 4872. It is to be observed that, whereas D.W.8 mentioned "the Chief Minister and his escort" in his evidence, Entry 4872 in Ex. D32 records "(car) CM and his escort." I shall come back to this matter later in this judgment if necessary. It should be noted that Ex. D32 was produced after both D.W.8 and D.W.9 had given evidence, and they were not recalled to be ques-

tioned on Ex. D32. Be that as it may, as stated earlier, I find that D.W.8 gave his evidence as he remembered it.

D.W.8 stated that at about the same time, 2.40 a.m., suddenly P.C. Yunus (P.W.3), who was close escort of D.W.1, came. D.W.8 stated that, on being asked why he came, P.W.3

"informed me that he was instructed to help me in my duties; but he did not tell me who had given him the instruction. It was not a normal thing, because never before this had a guard from the Istana come to help us in our duties."

D.W.8 then related how at 3.15 a.m., ASP Peter Paut came. This was recorded as Entry 4873 in Ex. D32. As the sentry did not know the ASP, the latter was not allowed in, but P.W.3 told the sentry that the ASP was a police officer. The ASP did not enter, and after giving advice about security, he left. P.W.3 also went back to the Istana.

At 3.30 a.m., D.W.8 saw a car bringing P.W.3 and Constable Ali Hassan (P.W.4) from the Istana stopping at the gate. The car was parked near the gate facing out from the Istana. D.W.8 then saw P.W.3 in conversation with Constable Faizul bin Zainal Amran (D.W.9). After that, P.W.4 went out through the gate together with P.W.3. When they did so, D.W.8 saw cars coming up to the Istana. D.W.8 then related how he saw P.W.3 and P.W.4 checking in the cars. "When the cars came near to both the police constables, I saw them checking the occupants of the cars. They knocked at the door of the car; and looked inside. Some, about 5 cars, were permitted in, while the others, about 10 cars, were asked to park outside the gate." D.W.8 saw the entry of the 5 cars, the first of which was CPS 203, normally used by the close escort to Datuk Harris, as C.M. D.W.8 stated:

"I feel that this was abnormal procedure because it has never happened before that the bodyguards themselves went down to let the visitors in. At that time, I approached my sentry, P.C. Faizul, and asked him why he let the people in; why he let the people whom he did not know, enter. P.C. Faizul replied that he had already asked P.C. Yunus. P.C. Yunus told him that it was the instructions given by Tun. I asked P.C. Faizul the identity of the person who was permitted in."

P.C. Faizul (D.W.9) replied that he was told by P.W.4 that it was Tun Mustapha. Although D.W.8 knew that this had contravened instructions, he allowed Tun Mustapha to enter because he heard that the instructions were given by D.W.1 and that P.W.3 and P.W.4 had said so.

D.W.8 also testified that apart from the 5 cars, about 10 persons on foot were let in by P.W.4 and he described how that came about.

In cross-examination, D.W.8 stated that at about 2.45 a.m., P.W.3 walked down to the Istana gate. When asked whether P.W.3 told him that there were instructions to let plaintiff into the Istana, D.W.8 replied in the negative. It was put to him that P.W.3 stated that he would stay and assist D.W.8 and the sentry at the gate, to which D.W.8 replied:

"I was the one who asked him. I asked him what he was doing at the gate. He told me that he was instructed to come down to help with the duties at the gate. He did not inform me who had given him instructions. I did not ask him who."

D.W.8 was cross-examined about his evidence of seeing P.W.3 at the gate at 3.15 a.m., in relation to the arrival of ASP Peter Paut. His reply was:

"I did make an entry about the arrival of ASP Peter Paut in the station diary. When he arrived, P.C. Yunus was at the gate. The time of arrival was about 3.15 a.m., according to the government clock. When I entered the time in the diary, I looked at the clock. ASP Peter Paut was with me for about 4 minutes. Soon after he left, Yunus went back to the Istana. He came back in a car at about 3.30 a.m."

During the course of cross-examination, D.W.8 was asked about the crowd at the gate, and he mentioned P.C. Yunus and P.C. Kassim being at the gate. In view of his evidence-in-chief, I consider that the mention of P.C. Kassim was a slip on his part, and does not in any way affect his credibility. It seems clear that what he meant to say was P.C. Ali Hassan.

P.C. Faizul bin Zainal Amran (D.W.9) testified that he was on sentry duty at the Istana gate between 1.00 a.m. and 4.00 a.m. on April 22, 1985. He stated that normally, instructions for people to enter the Istana were given by telephone and that such permission was also given by P.W.1 through the telephone.

D.W.9 corroborated the evidence of D.W.8 about the latter receiving instructions to let in Datuk Harris and his escort, which was relayed by D.W.8 to him. This was at about 2.40 a.m.

At about that time, D.W.9 saw P.W.3, who approached him but did not speak to him. P.W.3

came in a car. This is at variance with the evidence of D.W.8, who stated that P.W.3 was walking. As mentioned earlier, I regard both witnesses as honest and independent witnesses who gave evidence on events as they remembered them, and any contradiction in their evidence does not affect their credibility. Both witnesses corroborated each other that they saw P.W.3 at about 2.40 a.m. at the gate.

D.W.9 corroborated the evidence of D.W.8 about the coming of ASP Peter Paut at 3.15 a.m. when P.W.3 was at the gate and after ASP Peter Paut left, P.W.3 went back to the Istana.

D.W.9 also corroborated the evidence of D.W.8 about the coming of P.W.3 and P.W.4 to the gate at 3.30 a.m., the coming of a group of cars at about the same time, and the checking and letting in of 5 cars by P.W.3 and P.W.4, including CPS 203. D.W.9 continued:

"In my experience, neither of them had in the past checked cars into the Istana. P.C. Yunus told me that he was checking the passengers of the cars – whether they were the persons permitted to enter the Istana. He said it was on the instructions given by TYT. I did not do anything. After I had been asked by Corporal Rashid, then I told him about this."

D.W.9 also corroborated the evidence of D.W.8 about P.W.4 letting in some people, although he did not know how many.

D.W.9 further corroborated the evidence of D.W.8 about the coming of Datuk Herman Luping and that the latter was seen talking to P.W.4, although he did not know what they were talking about. In this connection, D.W.8 stated that Datuk Luping was refused entry by P.W.4.

D.W.9 testified that he saw P.W.3 and P.W.4 go back to the Istana on foot, leaving the closed escort car at the place where it was parked.

D.W.9 was cross-examined on the way P.W.3 checked the cars in. He stated that P.W.3 stopped each car as it came to the gate; and after each car was checked, P.W.3 asked D.W.9 to open the gate to let the car through. After the 5 cars passed, the gate was closed.

It is the evidence of Sunarno bin P. Sudarso (D.W.16) that at about 2.20 a.m. he was asked by P.W.4 to open the main door of the Istana building as Datuk Harris would be coming. No mention was made by him that he was also informed that Tun Mustapha would be coming, nor was he cross-examined on this. He stated that at first, he did not know that Tun Mustapha was at the Istana, but was informed later at about 4.00 a.m. to 4.30 a.m.

At the end of the case for the defendants, and after considering the evidence for the defendants, including the evidence of D.W.1 and taking into account all the inconsistencies and contradictions in the evidence of that witness and the criticisms made thereon in the written submissions of LCP, I was satisfied that the defendants had made out a case for the plaintiff to answer on the issue of whether the plaintiff's entry was at the invitation or with the permission, of D.W.1. The plaintiff called his three witnesses as earlier mentioned.

I now proceed to consider whether, on the evidence as a whole, the plaintiff's entry was at the invitation or with the permission of D.W.1. This would entail consideration of the evidence of the plaintiff's witnesses and weighing it against the rest of the evidence, including documentary evidence.

I shall first deal with the evidence of Constable Ali Hassan bin Muyong (P.W.4). Of the evidence of this witness, LCP stated, quite rightly, that the matter of when he made the relevant entries pertaining to certain events which occurred on April 21, 1985 and April 22, 1985 in his notebook (Ex. P63) has become a most important feature of his evidence. It was conceded that, if P.W.4 had lied on this aspect his credibility would be in doubt. It was, however, submitted that P.W.4 is an honest witness, albeit easily frightened, readily confused, incoherent, and incapable of understanding questions.

At the outset, I would make one observation. P.W.4's notebook (Ex. P63) was said to have been produced for the purpose of refreshing the memory of P.W.4. However, in the event, he gave evidence without having to refer to Ex. P63, although, in cross-examination, he admitted that he had a very poor memory of what happened "that night".

In-chief, P.W.4 stated that he had never worn a watch, and that he maintained a notebook for April 21/22, 1985. The notebook was produced as Ex. P63. Entry 508 relates to an event occurring at 0845 hours on April 21, 1985 and Entry 700 at 0800 on April 22, 1985. He stated that he made Entries 508, 509 and 600 on April 22, 1985, in the day time. As to Entries 601 to 700, he recorded

them on the same day, in the morning.

Ex. P63 was produced in Court wet, with the edges of some pages not intact. P.W.4 explained that the condition of Ex. P63 was attributable to it having been left in his trouser pocket; and his wife having soaked the pair of trousers overnight and washing them the following day, with Ex. P63 still inside the pocket. P.W.4 was cross-examined at length about how Ex. P63 became wet, and whether it was deliberately done. He was also cross-examined about what appeared to be torn or frayed edges of some pages in Ex. P63. Having considered the evidence on these matters. I am not prepared to find that P.W.4 had deliberately caused Ex. P63 to be in the condition in which it was produced in Court.

P.W.4 testified that sometime at midnight, after P.W.1 gave instructions to all bodyguards and close escorts to tighten security at the Istana, he and P.W.3 were instructed to patrol the Istana compound. They went separately in different directions. P.W.4 deposed that he went to the gate and a few minutes later, P.W.3 arrived. It was on this occasion that ASP Peter Paut arrived. After P.W.3 had spoken to the ASP, P.W.3 and P.W.4 returned to the office of P.W.1. The visit of ASP Peter Paut was recorded in Ex. P63 as having occurred at 2430 hours on April 21, 1985. P.W.4 testified that as to entries on times, sometimes he asked the times from friends; and furthermore, there was a clock in his car. As to the time of Peter Paut's visit, there is a conflict of evidence between P.W.4 and D.W.8 and D.W.9. I have no hesitation in accepting the evidence of D.W.8 and D.W.9 in preference to that of P.W.4, for the reasons given earlier on the evidence given by these two witnesses. I find that ASP Peter Paut came to the gate at 3.15 a.m. on April 22, 1985, as stated and recorded by D.W.8.

One of the events which the plaintiff alleges occurred, involving D.W.1 and P.W.1, P.W.3, P.W.4 and Corporal Sunoh Karto, D.W.1's bodyguard, and which, if true, indicates that D.W.1 had invited plaintiff to the Istana, was one which was described by P.W.4. It was also described by P.W.1 and P.W.3, although they differ in some respects. P.W.4 testified in chief:

"At about 2.30 a.m., I myself, Constable Yunus, Haji Mandalam and Corporal Sunoh were inside that room listening to the radio. Not long after that, I heard knocks behind Haji Mandalam's office. After that, I got up and drew the curtains. I noticed TYT outside, behind Haji Mandalam's office. Then I said: 'TYT TYT' to all the personnel who were inside the room. Then I went out followed by the others, to meet TYT behind Haji Mandalam's office. I arrived first. TYT instructed me. He said: 'Call Sunarno. Open my office and open the main door of the Istana.' He also said Tun Mustapha will come to the Istana. So I called Sunarno. When I arrived at his house, I saw that it was dark. I knocked at his door, and he came out. I informed Sunarno that I was delivering the instruction from TYT. I informed Sunarno that TYT asked you to go to his office, to open his office and also to open the main door to the Istana. I informed him that Tun Mustapha would be coming to the Istana."

In respect of this part of the evidence of P.W.4, it is pertinent to observe that, in cross-examination, when he was asked when he heard about the result of Datuk Harris he stated that he heard D.W.1 mention it at about midnight at the Istana at the time when the latter knocked at the back of P.W.1's office. He further said that D.W.1 told him that Datuk Harris had lost, at the time D.W.1 asked him to go for Sunarno. P.W.4 also stated that that was about 1 minute before the others arrived. In this connection, it is also pertinent to observe that the distance between the office of P.W.1 and the corridor behind it where the alleged incident took place was no great distance, and, if P.W.4 was telling the truth that he went out first followed by the others, it is, in my judgment, inconceivable that the interval between the time when P.W.4 reached D.W.1 and the time when the others did would have been as long as 1 minute. Further, whereas it was stated that the alleged incident in the corridor occurred at about 2.30 a.m., P.W.4 stated that D.W.1 told him, on the same occasion, that Datuk Harris had lost, at about midnight. Bearing these factors in mind, and also the differences between the version on the alleged incident given by P.W.4 and the respective versions given by P.W.3 and P.W.1, and for the reasons to be given later in relation to the assessment of this witness as a witness on other relevant matters, I do not consider that P.W.4 was telling the truth when he gave evidence about the alleged incident. I do not therefore accept his evidence on the alleged incident – and this, in spite of the entry relating thereto, recorded as Entry 605 in Ext. P63, in respect of which exhibit I shall deal with later.

P.W.4 testified that it was as a result of an instruction from D.W.7 when the latter arrived at the Istana with D.W.2 that he went to the gate, and there saw P.W.3 who was outside the gate then. He stated that after arrival, D.W.7 spoke to Sukarti, the Private Secretary, and then came to see him at the bodyguard room, and told him: "If Tun Mustapha's group arrive, allow them to enter", and instructed him to telephone the

guard room. He could not get through, and on being informed of this, D.W.7 instructed him: "Better for you to go down", and that was how he saw P.W.3 outside the gate, during which occasion, the event about the entry of plaintiff occurred.

On this aspect of the evidence of P.W.4, the evidence of D.W.7 reads:

"When we arrived at the Istana, we got out of the car and I saw TYT's ADC Mandalam, his P.S. Sukarti and a few others – I could not remember who they were. I did not pay particular notice as to how they were dressed. I said: 'Where is TYT.' Mandalam replied that TYT was upstairs and would be coming down shortly. He invited us to go into TYT's room. We waited in TYT's room. Not long afterwards, TYT came."

There is no mention whatsoever in the evidence of D.W.7 that he ever approached P.W.4 on that occasion; nor that he had spoken to the latter or given him any instructions. I consider D.W.7 to be an entirely honest, independent and impartial witness. What was alleged against him by P.W.4 relates to quite an important matter; and if P.W.4 was telling the truth, it would be indeed surprising that D.W. 7 would not have remembered the matter and mentioned it in his evidence. He was not cross-examined. It may be that at the material time no proof of evidence had been taken from P.W.4 – I know not. Further, the allegations would have meant that, in the presence of the ADC, D.W.7 chose not to give any information or instruction about such an important matter to him, but preferred to give it to P.W.4, who was under the ADC. To my mind, this is incredible. In cross-examination, he agreed that he was at the gate at 3.00 a.m., more or less. It was then put to him that, if that was so, and he waited at the gate until plaintiff came, D.W.7 could not have given him any instructions. To this, P.W.4 maintained that D.W.7 did give him instructions. If what P.W.4 said were true, it would have meant that D.W.8 and D.W.9 were not telling the truth when they both stated that P.W.4 came in a car together with P.W.3. In this connection, I have found D.W.8 and D.W.9 to be witnesses of truth whose evidence I accept. For the reasons given, I find that, if D.W.7 had indeed given the instructions alleged to P.W.4, the former would have said so in his evidence, and the fact that no such instructions were mentioned in his evidence, meant, in the circumstances, that the allegation of P.W.4 against D.W.7 cannot be accepted. I further find, considering the evidence of P.W.4 in the light of the whole evidence, and bearing in mind that cogent evidence is required to draw any such inference against P.W.4, that P.W.4 gave the evidence under discussion to justify his presence at the gate at about the time when plaintiff arrived; and to counter the evidence of D.W.8 and D.W.9.

P.W.4 then gave evidence about the arrival of plaintiff at the gate and the circumstances under which the latter was allowed entry. He attributed the checking of the cars to P.W.3. He stated that, when P.W.3 checked the Mitsubishi car used by plaintiff, the latter informed him that plaintiff was inside it; and he answered: "There is instruction." This does not appear in the evidence of P.W.3. The evidence of P.W.4 seems to indicate that he did not play an active role in checking in the cars. In this connection, I prefer without any hesitation the evidence of D.W.8 and D.W.9 that both P.W.3 and P.W.4 were involved.

P.W.4 admitted that he allowed 6 people to enter, one of whom, Hj. Karim Ghani, brought with him an envelope which he wanted to give to D.W.7. This was not put to either D.W.8 or D.W.9.

As to P.W.4's notebook (Ex. P63), he was cross-examined at length on when he obtained it and when he surrendered it to O.C.S. Sgt. Awang bin Haji Shahrin (P.W.5). He gave conflicting evidence on when he obtained it. In his evidence-in-chief, he stated that, if he was not mistaken, he surrendered the notebook in August, 1985, and asked for it from the police station at Karamunsing on February 10, 1986, because he saw LDC asking for the notebook of P.W.3 in Court on the same day. In cross-examination, in respect of some questions which could not admit of any mistake or misunderstanding on his part, he indicated that he obtained the notebook in August, 1985. This contradicts his evidence in chief that he surrendered it in August, 1985. He also contradicted himself in cross-examination when, in answer to a question whether, when he was handed the notebook in August, 1985, it was completely blank, he replied in the affirmative; but subsequently stated that there was "sudah ada isi". He also contradicted himself in cross-examination when, on the one hand, he said that before April 1, 1985, he had no notebook; while, on the other hand, he stated subsequently that from 1974 to August, 1985, he had no notebook. Subsequently, he stated that he was confused when he stated that he got the notebook in August, 1985, and did not know how he answered the day before. The evidence of P.W.4 as to when he obtained the notebook is clearly far from satisfactory.

Two witnesses, P.W.5 and Sgt. Wahab bin Udin (P.W.6), were called by plaintiff to support the evidence of P.W.4 that he received the notebook from P.W.5 between February and March, 1985, and that it was in August, 1985, that he surrendered it to P.W.5. Although certain aspects of the evidence given by P.W.5 do not appear to be satisfactory as, for example, his evidence that, on the one hand, he knew from the newspapers that he was involved in the issuing of the notebook; and his evidence that, on the other hand, it was a police officer who told him that he as O.C.S. was involved. However, I am not prepared to regard this witness as a witness whose evidence as to he being the person who issued the notebook Ex. P63 to P.W.4, should be rejected, particularly viewed in the light of the evidence given by P.W.6, whom I have no reason to consider to be an unimpartial witness. Further, I also take into account the fact that the entries in Ex. P63 cover the period from April 1, 1985 to July 19, 1985. In my view, it would have been a remarkable feat on the part of P.W.4 to have been able to write in all the entries in Ex. P63 covering the whole of that period if the notebook had been issued to him in August, 1985, subsequent to that period unless all the entries were invented. For the reasons given, I am prepared to accept the evidence of P.W.5 that Ex. P63 was issued by him to P.W.4 in February or March, 1985.

I now come to the crucial question as to when Entries 508 (0845 hours on April 21, 1985) to 700 (0800 hours on April 22, 1985) were recorded by P.W.4 and whether they were done on April 22, 1985, as he alleged in his evidence.

In his evidence-in-chief, when he was asked how, when he had no watch, he remembered, in relation to Entry 603, that Peter Paut came to the gate at 2430 hours, as recorded, P.W.4 replied that he just estimated the time. I have earlier dealt with the matter recorded under this entry.

P.W.4 was cross-examined at great length on the entries mentioned earlier. Questions such as those pertaining to the style of writing and P.W.4's memory on the times recorded in relation to each event were raised.

In considering the evidence of P.W.4 on the relevant entries made in Ex. P63, I have to bear in mind that his evidence as a whole has to be considered, and weigh it against the whole of the evidence. Further that where a witness has been found to be not telling the truth on certain matters, it does not necessarily follow that that would be so in respect of other matters, which have to be independently and separately considered.

Under cross-examination, P.W.4 admitted that he could not translate time in terms of hours. When asked how he could make the entries in Ex. P63 in terms of hours, he replied: "Because I looked at the wall clock at the Istana and also at my house. That was how I counted time." I do not regard this as a convincing answer. In Court, although he got one answer right, when tested, he stated, when looking at the clock in Court which showed 9.45 a.m., that it was 2245 hours! It seems quite clear from his own evidence that P.W.4 had difficulty in translating time in terms of hours. This seems to be evident when, in answer to questions put to him regarding markings against the entries at pages 14, 15 and 16 which show conversion of a 24-hour clock, he replied:

> "Because the time stated like 1400 hours, sometimes I do not understand. That was why I made them, to make it clear."

In relation to Entry 603 regarding the visit of Peter Paut, he stated that after he returned to the Istana, he looked at the clock on the wall of the Istana, and then wrote that entry when it was daylight. I have found that P.W.4 is not to be believed on this matter. It will be recalled that he stated that he recorded Entries 508 to 700 on April 22, 1985 during the day. He stated that he asked his friends about the times – sometimes Yunus (P.W.3); sometimes Mandalam (P.W.1); sometimes he saw the clock in the car. He stated that in making the entries, he did not ask P.W.1 or P.W.3 to help but did the recording himself. He also stated that he remembered the events that occurred on the night of April 21, 1985 and early morning of April 22, 1985, and recorded them after looking at the wall clock at home. This answer contradicts what he had stated earlier that he asked P.W.1, P.W.2, and looked at the clock in the car. Further, if, as he stated, he was able to record the times in relation to the events under each entry after looking at the clock at home, it is difficult to believe how, on his own admission that he was unable to translate time in terms of hours, he could have done so in respect of each of the entries as recorded. If his memory was so good in relation to the events of April 21, 1985 and April 22, 1985, how was it that he did not record the arrival of plaintiff in Ex. P63. When questioned, he replied:

"I don't remember all that at the time as I was busy."

He stated that he did not record later because he did not only concentrate on that occasion. Subsequently, in further cross-examination, he stated that he had a poor memory of what happened that night.

The answers to some of the questions put to him in cross-examination were contradictory or difficult to believe and there is no reasonable explanation why that should be so. For example, after being asked 3 times whether he knew that this case was about the appointment of a Chief Minister, he replied at first that he did not remember; and then gave an affirmative answer. When asked when did he first know, he stated that it was in April, when he received the subpoena; yet, these proceedings were not instituted until May! Again, he initially disagreed that what he did at the gate on April 22, 1985 was outside his normal duties; but later agreed that that was so.

He had earlier admitted that what he recorded in Ex. P63 included his duties and instructions given to him.

Entry 605, which relates to the alleged incident outside the office of P.W.1 at about 2.30 a.m. on April 22, 1985, was put to P.W.4 sentence by sentence. He admitted that all that was recorded in that entry was evidence and did not relate to duty or instruction; and that it was exactly the evidence he gave in Court. When questioned as to why he had to include matters when they were not instructions, he replied that it was just for his own reference; but not for any particular purpose. He admitted that they were recorded so that he could study it and give evidence in Court.

The most revealing evidence on the recording of Entry 605 was given by P.W.4 towards the end of his cross-examination. The relevant part reads:

"*Q.* Put it to you that all that was written under Entry 605, from P.17 to P.24, was written long after 22.4.85. Agree?
A. Yes.
Q. Could you tell how long after 22.4.85 did you write this.
A. I wrote it down on 22.4.85.
Q. It cannot be true, because at that time you did not know there was to be a court case.
(*Court:* Interpreter explains questions several times).
A. I do not remember.
Q. You can't remember when you wrote it. Is that right?
A. When I said I do not remember, I mean I do not remember when I made the entry which starts from 21.4.85.
Q. Since you said it was written to help you in court case, entry from 21.4.85 could only have been written after you are aware of the court case. Agree?
A. Yes, I agree. I understand the question."

It is clear from the above questions and answers, that P.W.4 admitted having made the entries starting from April 21, 1985 after he became aware of the court case, which was commenced in May 1985, more than a month after April 22, 1985. This is in direct contradiction to his earlier evidence that he made the entries on April 22, 1985. On this evidence alone on a crucial matter involved in this action, I consider that that is sufficient to establish that P.W.4 is not a truthful witness, whose evidence cannot be believed.

I had earlier dealt with certain other unsatisfactory aspects of the evidence of this witness which I also find to indicate that P.W.4 is not a credible witness.

Further, his explanation on the numbered entries is equally unconvincing. Further, his credibility is also in doubt when one looks at the dates in the Entries 603, 604 and 605, which respectively show April 21, 1985, when they should have been April 22, 1985 respectively.

LCP has described him to be a witness who was easily frightened, readily confused, incoherent, and incapable of understanding questions. In this connection, great pains had been taken to ensure that questions put to P.W.4 were understood by him before he gave his answers. Where he indicated that he did not understand any question, it was explained to him – on occasions, more than once. I am fully satisfied that whatever answers he gave, he did so after he had understood the relevant questions concerned. Having observed him in the witness box, and after considering his evidence, I find, with respect, that, as distinct from being easily frightened, P.W.4 went into the witness box in a nervous state and, in the light of his evidence, I have come to the conclusion that the main reason for this condition is because he had come to Court after rehearsing his evidence, including that contained in Ex. P63, which as stated earlier, he had no need to refer to while giving evidence in order to refresh his memory, and the fear of cross-examination on his evidence. An honest and truthful witness would have no such fear.

For the reasons given, and bearing in mind that the standard of proof is that of a criminal standard

of proof beyond any reasonable doubt so that I have to be sure, I find that the relevant entries in Ex. P63 on which P.W.4 had given evidence had been fabricated by him for the purpose of these proceedings. In this connection, I do not believe him when he stated he had forgotten about Ex. P63 when the plaintiff's lawyers interviewed him. I have reached this conclusion after bearing in mind the re-examination of P.W.4 and what was submitted by LCP that P.W.4 had no motive and had no reason to give untrue evidence. To this, I would venture to remark that it is not unknown for untrue evidence to be given without a motive.

I find P.W.4 to be an unreliable and untruthful witness whose evidence cannot be believed. I reject his evidence, including his evidence on the 2.30 a.m. incident and the evidence relating to the circumstances under which he went to the Istana gate and what happened there, except his admissions.

I now come to deal with the evidence of Constable Mohamed Yunus bin Mohamed Yasin (P.W.3). In his evidence-in-chief, he corroborated the evidence of P.W.1 that the latter instructed him to go to the Istana at 8.00 p.m. on April 21, 1985, although he stated that such instructions were given at 2.00 p.m., whereas P.W.1 said that it was at 11.00 a.m.

P.W. 3 testified that, between 9.00 a.m. and at about 1.00 a.m. he went out to patrol the Istana grounds. At about midnight, on instructions from P.W.1, he and P.W.4 went out on patrol, but they went different ways. At about 1.10 a.m., when he went to the guard-house at the gate, he saw ASP Peter Paut talking with D.W.9. He had a conversation with the ASP. Before that, he saw P.W.4 walking towards the gate, after which they walked together to the gate. After the conversation with the ASP, he returned to the Istana on foot with P.W.4.

P.W.3 did not agree with the time, 3.15 a.m., given by D.W.8 when ASP Peter Paut came to the gate. Also with the evidence of D.W.8 that during the visit of ASP Peter Paut, P.W.3 was alone. On these matters, I have commented on the evidence of D.W.8, which was corroborated by the evidence of D.W.9. As between the version of D.W.8 and that of P.W.3, I prefer the version of D.W.8, for the reasons already given.

P.W.3 then related how he went to the guard-house again at about 1.30 a.m., and after he went back to the Istana, on instructions from P.W.1 he went with P.C. Kassim, the other close escort driver, to the Private Secretary's house with a message from P.W.1 that Datuk Herman Luping wanted to talk to the Private Secretary through the telephone. On the other hand, in cross-examination, P.W.1 stated that "I only asked them to say that Datuk Herman Luping wanted to contact Sukarti because of something important, to arrange for swearing-in." After passing the message, he was informed by the Private Secretary that the latter would go to the Istana. This evidence is of course hearsay. P.W.3 returned to the Istana at more or less 2.00 a.m.

In cross-examination, P.W.3 stated that after that, he was inside P.W.1's office, chit chatting with P.W.1, Sunoh Karto the bodyguard of D.W.1, Kassim and P.W.4, and listening to the radio. He remained at the office for more or less 25 minutes. When asked about the evidence of P.W.1 regarding his receiving a telephone call in his room from Puan Zubaidah, the Personal Assistant to Datuk Harris, at about 2.15 a.m., P.W.3 stated that he did not remember. Neither did he know about P.W.1 going upstairs to tell D.W.1 about the telephone call. He also did not remember about what was stated by P.W.1 that after receiving Puan Zubaidah's telephone call, P.W.1 asked Corporal Sunoh Karto to go into his room to man the telephone.

In his evidence-in-chief, P.W.3 related the events concerning what happened at 2.30 a.m. He stated:

> "I heard knock on the glass behind the ADC's office. After Constable Ali Hassan drew part of the curtains, he said: 'TYT. TYT.' I saw TYT was outside; immediately all of us in the ADC's office went out. We went towards where TYT was. When we arrived near TYT, TYT did say (something) to Constable Ali Hassan. I could not hear clearly what was being said to Constable Ali Hassan. After that, TYT was facing me. He said: 'Datuk Harris and Tun Mustapha together with his party will come to the Istana'; and TYT instructed me to go to the guard-house. He said: 'You go to the guard-house. Inform the guard-house that Datuk Harris, Tun Mustapha and his party will come to the Istana. Allow all of them to enter'."

In cross-examination, he stated that he forgot to make any entry in his driver's form (Ex. D62) because he forgot to write down. He did not however state that such events were not normally recorded in a driver's form. In his evidence-in-chief, he stated that he could not hear clearly what was said by D.W.1 to P.W.4. However, in cross-examination, he said: "I did hear TYT said to Ali

Hassan. What I heard was the word, Tun Mustapha. Then he mentioned Sunarno. That was before he spoke to me." It seems strange that this evidence was not given by P.W.3 when he was examined-in-chief.

The differences between the version given by P.W.1 and his were put to P.W.3 regarding the 2.30 a.m. incident. They include the omission of "and his party" in relation to the coming of plaintiff and Datuk Harris, in the evidence of P.W.1. As against the mention of "allow all of them to enter" in P.W.3's version being referrable to the party of "Datuk Harris and Tun Mustapha", that in the version of P.W.1 was referrable to "Datuk Harris and Tun Mustapha" without mention of "his party". It was suggested that P.W.3 made up the version about "his party" and "allow all of them" to explain something which P.W.1 could not explain earlier. The reply of P.W.3 was that he did not agree, and he denied that he made it up, and that he was stating what he received as instructions. P.W.3 stated that D.W.1 had never before given him an instruction directly to him in the company of bodyguards and the close escort driver Kassim, but added that D.W.1 could give instructions to anybody he felt right.

P.W.3 was asked about the necessity of using the telephone in P.W.1's room to transmit D.W.1's instructions to the guard-house, while there was a telephone outside which was nearer. P.W.3 at first replied that he had forgotten about that telephone. When it was pointed out that that telephone must have been very well known to him, he stated that sometimes that telephone was out of order. He subsequently reverted to his explanation that he really could not remember about that telephone, which he had completely forgotten.

As to his evidence on his trips to the Istana gate, I prefer without hesitation the evidence of D.W.8 and D.W.9. I also prefer their evidence, for the reasons already given, as to what transpired at the gate on the arrival of the plaintiff. I find it incredible that, if his account about the 2.30 a.m. incident were true, he would have shouted instructions to the gate guards from the top of the slope behind the guard-house. I find on the evidence of D.W.8 and D.W.9, that P.W.3 made 3 trips to the gate, at 2.40 a.m., 3.15 a.m. and 3.30 a.m. respectively. I also find, on the evidence accepted by me, that D.W.8 and D.W.9 were not, as alleged by P.W.3, informed about the coming of Datuk Harris and plaintiff and no instructions had been given to them to admit these two celebrities; and that it was only after plaintiff had been checked in by P.W.3 and P.W.4 that they came to know about the entry of plaintiff.

P.W.3 admitted in cross-examination that D.W.1 had never given instructions to him in the presence of the ADC, bodyguards and the other close escort driver. He also admitted that he had never before done what he did in checking cars or people into the Istana; and that what he had done on that occasion was outside his normal duties. However, he said that, whatever instruction was given to him, he obeyed orders. As to why he helped at the gate, he said he did it on his own initiative; and that he was not instructed to do so by D.W.1. He stated that he assisted the guards on his own free will; and for the good and safety of the Istana, as the security of the Istana was also his responsibility. However, he gave no satisfactory explanation about this. When it was pointed out to him that plaintiff and Datuk Harris and plaintiff's party posed no security risk, his reply was, "As for me, before I think of the good side, first and foremost I think of the security for the good of everybody" – a rather strange and unconvincing reply, in view of the personalities named, and in view of his admission that neither D.W.1 nor P.W.1, nor anyone else, had told him that there was a security risk. On the other hand, on being asked what made him to volunteer, according to him, to tell D.W.8 that he would assist D.W.8, he replied that, in his opinion, it might be due to the busy situation, meaning the arrival of Datuk Harris, plaintiff and his party, with no mention of security or safety of the Istana.

P.W.3 was asked whether P.W.4 was with him before the arrival of plaintiff. His reply was evasive. He said: "That I do not know. I only knew I was alone." Then: "Might be he came down during the busy situation", and when asked how long before the arrival of plaintiff, he replied that he did not know. He stated that he could not remember whether P.W.4 helped him to check the cars in; but subsequently stated that he had no help from P.W.4.

On being asked why he did not record in the bodyguard diary (Ex. P60) the entry of plaintiff, he stated that he thought that D.W.8 had recorded it in the guard-room diary (Ex. D32). He subsequently stated that it was because at the time the situation was busy and it never occurred to his mind to record it down. He later reverted to his original version.

P.W.3 gave evidence that after the swearing in of plaintiff, he and some bodyguards and close escorts escorted plaintiff home, using the cars used by the close escorts. This was recorded in Entry 1165 in Ex. P60. It is clear from the evidence that after the swearing in, plaintiff did not leave the Istana until about 7.00 a.m. There is an obvious alteration made by someone in Entry 1165 to make it appear that plaintiff was escorted home at 5.50 a.m. That such an alteration was done on purpose there can be no doubt as, otherwise, the entry would indicate that after the swearing in at about 5.30 a.m., plaintiff had remained at the Istana until his departure at about 7.00 a.m. Asked about the reason for providing escort to plaintiff, P.W.3 replied that he knew from Constable Joharin that he had received an instruction from P.W.1 to make use of the said cars to escort plaintiff back to his house, because plaintiff has been appointed Chief Minister. P.W.1 professed to know nothing about this, but, having regard to the fact that the bodyguards and close escorts and their drivers were directly under P.W.1, it is inconceivable that they would have used their cars which were exclusively utilised for escorting D.W.1 and his family, without the knowledge and instruction of P.W.1.

I have found that P.W.3 and P.W.4 came to the gate at about 3.30 a.m. shortly before the arrival of plaintiff and his party. I find on the evidence as accepted by me that this is no coincidence, and that P.W.3 and P.W.4 came with prior knowledge of the impending arrival of plaintiff and his party. P.W.3 has given evidence that the close escort of Datuk Harris used to borrow his walkie-talkie, implying that there was no walkie-talkie in CPS 203. I do not believe his evidence.

It is inconceivable that a close escort to such an important personage as a Chief Minister who is concerned with the protection and safety of the latter, would have been furnished with a car without a working walkie-talkie or with radio communication. It is in evidence that the Istana and plaintiff's house at Tanjung Aru are within communication distance by walkie-talkie. I find on the evidence that the only reasonable inference is that the journey to the Istana of plaintiff and the approximate time of his arrival were communicated to or known by someone at the Istana, resulting in P.W.3 and P.W.4 being at the gate at 3.30 a.m., shortly before the arrival of plaintiff. Even on the assumption that the 2.30 incident did take place, this, on the evidence, has no connection with P.W.3 and P.W.4 being at the gate at the specified time, because of the difference in time. Hence, I find, on the evidence, that plaintiff obtained entry to the Istana through the assistance of P.W.3 and P.W.4. I also consider it a reasonable inference on the evidence that the journey of P.W.3 and P.W.4 to the gate for the purpose mentioned, was likely to have been made on the instruction, or at least with the knowledge, of P.W.1.

In the light of the evidence of D.W.8 and D.W.9 involving P.W.3 and P.W.4 which I have accepted, and having observed him giving evidence, I find P.W.3 to be an unimpressive and unreliable witness whose evidence lacks credibility. He was evasive at times, as, for example, when asked about the part P.W.4 played in the checking in of the cars, and whether the latter was with him. I have referred to some of the inconsistencies and contradictions in his evidence. I have also referred to his mentioning of the names of the plaintiff and Sunarno spoken by D.W.1 to P.W.4 during the alleged incident at 2.30 a.m. in cross-examination, when he made no such mention in his evidence-in-chief. There were pauses, sometimes long, before a number of his answers given in cross-examination which did not give the impression that he was recollecting events, but rather thinking of the best way to answer.

For the reasons already given, I reject his evidence that he was at the gate from 2.40 a.m. and did not leave until after he checked in the 5 cars and the Commissioner of Police, and this was as a result of the instruction he received from D.W.1 during the 2.30 a.m. incident as described by him.

It is said that he was clearly honoured to receive an important direct instruction and was proud that he used his own discretion in the service of D.W.1, to please the latter and to fulfil what appeared to be the latter's wishes. As to this, I would, with respect, observe that even if there were such instructions from D.W.1, the taking over the duties of checking in cars and people from D.W.8 and D.W.9, which was never done before, belies this. P.W.3 knew what his proper duties were, and the unsatisfactory replies as to why he found it necessary to take over the duties of D.W.8 and D.W.9 support this view.In this connection, his reply, after pausing, to the question as to whether he found it necessary to tell P.W.1 of what he had done at the gate was also unconvincing and cannot be believed. He stated he told P.W.1: "Tuan, I have done the duty of assisting the guard-house sincere-

ly and on my own free will at the time of Datuk Harris, Tun Mustapha and his group's arrival at the guard-house", to which, he stated, P.W.1 replied: "Bagus juga" (It is good).

Weighing his evidence against the rest of the evidence, I also do not believe his evidence about the 2.30 a.m. incident, and that D.W.1 gave him the instruction as described by him. Whether he has any motive or not for giving untrue evidence does not affect the matter.

I find on the evidence accepted by me that P.W.3 and P.W.4 unilaterally took over the duties of gate guards at the gate by giving misleading information to D.W.8 and D.W.9, when D.W.8 and D.W.9 were capable of performing such duties themselves and that this was done in order to ensure that plaintiff and his party obtained entry into the Istana.

If it is said that P.W.3 was conscientious in performing his duties, this is not supported by his failure, without good reason, to record relevant entries in the bodyguard diary (Ex. P60) and in his car form.

I shall now deal with the remaining witness for the plaintiff, Haji Mandalam bin Marziman (P.W.1), the A.D.C. to D.W.1 at all material times. I shall do so under several heads, relevant to the subject-matter under discussion.

(1) *The Fish Pond Conversation*

P.W.1 alleged that this conversation took place after the 2.30 a.m. incident which will be dealt with later. P.W.1 gave two separate versions of this alleged conversation. In the first version on January 20, 1986, he said:

"When we reached the pond inside the Istana, TYT stopped and looked at the fish, and he said to me: 'I did receive a phone call from Datuk Harris saying that Berjaya and USNO wanted to form a coalition government; and besides that, to swear in Tun Mustapha as the Chief Minister'."

The second version, given by him on the following morning, reads:

"The instructions were given while we were at the pond. TYT said that he had received a phone call from Datuk Harris. He was informed that Berjaya and USNO will form a coalition government. TYT has given the decision to appoint Tun Mustapha as the Chief Minister and invited him to the Istana. We at the Istana must be ready to welcome them, that is, Tun Mustapha and Datuk Harris; and to get ready for the swearing in."

It is to be noted that the latter part of the second version takes the form of instructions: to be ready to welcome Datuk Harris and Tun Mustapha; and to get ready for the swearing in. It is also to be noted that there is no evidence to indicate that, as ADC, P.W.1 took any steps to relay these instructions to the guard-house; or to record them in the bodyguard diary (Ex. P60) or anywhere else.

It is apparent that the 2 versions contain important differences. Whereas the first version states that Berjaya and USNO "wanted" to form a coalition government, the second states that they "will" do so. Whereas the first version mentions to swear in Tun Mustapha as Chief Minister, the second states "get ready for the swearing in". There is no mention in the first version of (a) D.W.1 having given a decision to appoint Tun Mustapha as the Chief Minister; (b) D.W.1 inviting him to the Istana; and (c) the instruction that "We at the Istana must be ready to welcome them, that is, Tun Mustapha and Datuk Harris".

In cross-examination, P.W.1 agreed that the 2nd version was (a) much fuller; (b) much more detailed; and (c) gives more information in a much more detailed and firm form. He stated the 2nd version was the right one. In further cross-examination, he said that there is no difference between "wanted to" and "will form"; and that he cannot tell the difference between the 2 versions. This contradicts his earlier replies, and his replies to further questions. It will suffice to quote an example. He disagreed that the following words in the second version are important: "and invited him, that is, Tun Mustapha, to the Istana"; but later, after persistent questioning, the following questions and answers appeared:

"*Q.* And you know that whether Tun Mustapha was invited or not is very important in this case.
A. Yes, I know.
Q. And you know that if TYT told you that Tun Mustapha was invited, that would be very important in this case.
A. Yes."

He was also evasive or vague at times. One example is the following:

"*Q.* 5th difference is you said in the second version: "Get ready for swearing in", but not in the first version. Do you agree there is a difference.
A. It is the same."

Later, after further questioning, he said: "Yes, I can see the difference." He agreed that the second

version made it clear that D.W.1 was telling him to get ready for swearing in Tun Mustapha. He was questioned as to why he did not go and put on his uniform to get ready for the swearing in, and he replied that it was because D.W.1 did not mention when the swearing in was to take place. This is an unconvincing answer. Further questions and answers followed:

"*Q.* All of those changes are helpful to Tun Mustapha's case. Do you agree?
A. No. I do not agree.
Q. You think they are helpful, unhelpful or no difference.
A. Because the evidence I gave on 1st day was not complete. The evidence I gave on 2nd day was complete.
Q. When did you realise your evidence on 1st day was incomplete.
A. When I went back home and I thought about it.
Q. In what way do you think it was incomplete."

Then followed the rather strange reply –

"*A.* Because on the 1st day, I was in a hurry to give evidence; that was why it was not complete."

As to this reply, P.W.1 did not explain why he was in a hurry to give evidence on the first day. In Court, no one hurried him. Indeed, the Court was at pains to ensure that all the questions put to him were understood by him before he answered them; and that he had time to answer them. Then followed his listing out all the differences in the second version. He stated that he told Mr. Sri Ram the next morning that his evidence was not complete and if possible, he wanted it to be repeated. He also stated that he did not tell the said learned counsel what he wanted to say, except that there was something he had left out. I find it difficult to believe this.

The following two questions and answers are also significant:

"*Q.* So you were saying that you were somebody who did not know what this case was really about or what you were here to prove. Right, isn't it?
A. Yes.
Q. Can you explain why somebody with that state of mind should think at home after the 1st day's evidence that you have left out important evidence which you should give next day?
A. I cannot explain."

Considering these questions and answers, taken together with the other relevant parts of his evidence on the subject-matter of the alleged conversation at the fish pond, and his demeanour while giving evidence, I cannot accept P.W.1 to be a reliable and witness of truth whose evidence is credible and can be accepted, in relation to this alleged conversation. He had ample opportunity to state on the earlier occasion what he gave in evidence in the second version; he gave no explanation why he was in a hurry; no one hurried him; and he was given ample time and opportunity to give his evidence. I therefore arrive at the only reasonable conclusion that, after the previous day's proceedings in which the first version was given by him and realising that he had not given satisfactory, as distinct from incomplete, evidence in the first version, he sought to supplement it by giving the second version the next day. I do not believe him when he stated that he did not know what the case was about or what he was in Court to prove.

I also find that the allegations in the two versions to be inherently incredible for the following reasons:

(1) In cross-examination, P.W.1 stated that he knew that whether plaintiff was invited was very important in this case. He also said that if D.W.1 told him that plaintiff was invited, that would be very important in this case. In this connection, D.W.1 was cross-examined about the alleged 2.30 a.m. incident, and it was suggested to him that when the 5 security guards came out to speak to him, he told them: "Datuk Harris and Tun Mustapha will be coming." It seems clear that this question was put, based on instructions, as the questions following that, show. There was no mention about the alleged conversation at the fish pond. It has been pointed out that P.W.1 only gave a full statement after he left the Istana. However, having regard to the admission that P.W.1 knew that the matter about plaintiff being invited to the Istana was important, I do not believe that, when he gave his earlier statement to the legal advisers of the plaintiff, P.W.1 would have conceivably omitted to give the version about the alleged conversation at the fish pond to them, as it was a very relevant matter in this regard.

(2) The instruction or remark about getting ready for the swearing in of plaintiff clearly suggests that the event mentioned is not far off. The explanation by P.W.1 about not putting on his uniform because D.W.1 did not mention when the swearing in was to be done is difficult to believe, particularly when his quarters was a short distance away.

(3) The credibility of P.W.1 is affected by his admission, only after persistent questioning, that there were important additions to the second version which he had not admitted earlier.

(4) The circumstances in which these additions came about, and the unsatisfactory explanation given by P.W.1 as to the changes in content between the two versions, show that the alleged conversation cannot be believed in the circumstances. I also do not believe his explanation on re-examination in effect that what he stated in his second version was what he meant by his first version. Hence, I reject the evidence of P.W.1 about the alleged conversation at the fish pond.

(2) *The 2.30 a.m. incident*

I have earlier dealt with the evidence of P.W.3 and P.W.4 respectively on this matter, and have given my reasons for not accepting their evidence.

P.W.1's version is this:

"At about 2.30 a.m. I was in my office. At that time, all the bodyguards were in my office. We sat in my office, listening to the radio. At that time, something attracted my attention. Somebody tried to force open the back door, but that door was sealed and could not be used any more. After that, I heard knocks behind my back. Constable Ali Hassan opened the curtain behind me. He said: 'TYT TYT.' Then I turned and noticed Tun. When I saw Tun, I got up and went out. All the other bodyguards followed me. When we reached the corridor behind my office, myself, Sunoh Karto, Yunus, Ali Hassan and Kassim Bakar met the TYT. He looked at us by moving his head from one side to the other (demonstrates). TYT directed Ali Hassan to call the chief steward Sunarno. TYT informed that Tun Mustapha and Datuk Harris wanted to come. TYT asked Ali Hassan to ask Sunarno to come and open his office and main door to his office.

I saw Ali Hassan went to the servants quarters. TYT ordered Mohd. Yunus to go to the guard room to inform that Tun Mustapha and Datuk Harris wanted to come and allow them to enter. After receiving the order from TYT, Yunus went away."

I have earlier compared the version of P.W.1 with that of P.W.3. As with the versions given by P.W.3 and P.W.4 respectively, I bear in mind at all times when dealing with and comparing the evidence of all 3 witnesses, that human memory is fallible, and I have to distinguish between a genuine mistake or omission and one which is not; and whether it was the first time any of these witnesses was giving evidence in Court.

There are differences in the 3 versions. Whereas P.W.1 mentioned about D.W.1 trying to force open the back door, this did not appear in the evidence of P.W.3 or P.W.4. P.W.1 stated that he went out first, followed by the others; but P.W.3 said that all who were in P.W.1's office went out. On the other hand, P.W.4 deposed that he went out first, and the others arrived about a minute later. The descriptions as to the manner these witnesses and the others met D.W.1 in the corridor were also different. On P.W.1's version, he was able to hear what D.W.1 said to P.W.3 and P.W.4. However, whereas the P.W.3 version mentioned "together with his party", this is absent from the P.W.1 version.

As with the position of P.W.3 and P.W.4 when I dealt with their evidence on the same matter, I also consider P.W.1's evidence in the light of the whole of the evidence, including that of D.W.1, in reaching my conclusion. I find, on the evidence, and not forgetting that relating to the personal official diary of P.W.1 (the Red Diary) (Ex. P53), that the evidence of P.W.1 on the 2.30 a.m. incident cannot be believed, for the following reasons:

(1) If the incident were true, there should not have been the differences between the respective versions of P.W.1, P.W.3 and P.W.4, particularly bearing in mind that the forcing of the back door is not something to be easily forgotten. Further, in my judgment, the statement of P.W.4 that he went out about one minute before the others is a major difference with the evidence of P.W.1.

(2) The allegation of P.W.1 about D.W.1 trying to force open the back door was not put to D.W.1. In this connection, I make the same observation about P.W.1's earlier statement to his legal advisers.

(3) P.W.1 could give no reason why D.W.1 should have come to the corridor in the manner described by him and give his instructions and further, P.W.1 stated he would not have expected D.W.1 to do so.

(4) P.W.1 ventured the reason that it might have been that D.W.1 phoned his office to give instructions, but the phone was engaged; but he could not remember whether his phone was in fact engaged at 2.30 a.m. In this connection, on his own evidence, P.W.1 had an intercom in his office, and having regard to the time of morning and the people then present at the Istana, it is difficult to believe and accept that the intercom was also engaged at the material time.

(5) Whereas P.W.1 stated that when D.W.1 asked P.W.4 to call the chief steward Sunarno (D.W.16) to open the main Istana door, the door to D.W.1's office, he also informed that "Tun Mustapha and Datuk Harris wanted to come", D.W.16 testified that P.W.4 told him that only Datuk Harris would be coming, and he only knew about the coming of plaintiff when he was subsequently informed by plaintiff's son. If the name of plaintiff had been mentioned by D.W.1 during the 2.30 a.m. incident, P.W.4 surely would have mentioned such name and who gave the instructions to D.W.16, who was concerned with preparing refreshment for guests at the Istana.

(6) The allegations of the plaintiff about the earlier telephone conversation between D.W.1 and Datuk Harris have been rejected, and there is no evidential basis for taking the view that D.W.1 had acted as alleged by P.W.1, P.W.3 and P.W.4. Rather, the evidence about the receipt of a telephone call by P.W.1 from the Personal Assistant of Datuk Harris, which also featured in the evidence of D.W.1, about the intended visit of Datuk Harris, runs counter to the allegations. Accordingly, for the reasons given, and considering the whole of the evidence of P.W.1 in the light of the rest of the evidence in this case, I reject the evidence of P.W.1 on the 2.30 a.m. incident.

(3) *The Personal Official Diary (Red Diary) of D.W.1 (Ex. P.53)*

This Red Diary was produced late, during the cross-examination of P.W.1, although, towards the end of his examination-in-chief, he mentioned it in evidence, together with the existence of the body-guard diary (subsequently produced as Ex. P60) and his personal notebook (Ex. P54). P.W.1 stated that it was only as a result of a request from LCD that he produced the Red Diary (Ex. P53) and it is said that the fact that he did not do so was, in view of its contents, indicative of his loyalty towards D.W.1. With respect, I do not, on the evidence, accept this to be so, particularly as its existence was disclosed at the end of his evidence-in-chief, and could have been produced then if desired, although he then stated that he did not have it in Court and was not examined on its contents.

The relevant entry in Ex. P53 dated April 22 reads:

"PAGI

2.30 a.m. – TYT datang di Pejabat saya, Sebelum TYT masuk, TYT (Beliau) mengetok cermin belakang pejabat saya. Kami orang mawok TYT dan terus keluar berjumpa dengan beliau. Dan TYT memberi arahan Konst. Ali Hassan pergi rumah K/Pelayan untuk memanggil datang ke Pejabat, untuk membuka Pintu Pejabat TYT dan Pintu masuk Pejabat, dan TYT olok lagi se-orang untuk pergi ke bilek pengawal; dan memberi tahu Datuk Harris dan Tun Mustapha mahu datang ke Istana, dan benar kan mereka masuk."

I have to decide whether this is a genuine entry, or one which has been fabricated by P.W.1. Before deciding on the latter, I have to bear in mind that it requires the criminal standard of proof, that is, proof beyond any reasonable doubt, and nothing short of this. It is common ground that this entry was made by P.W.1.

At this stage, I would make one observation. As stated above, the existence of Ex. P53 was revealed by P.W.1 at the end of his evidence-in-chief, when it could have been produced, if so desired. In view of the nature of the contents of the entry made under April 22, 1985, which, if true, clearly implicates D.W.1 and indicates that the subsequent entry of plaintiff into the Istana was on the invitation of D.W.1, it seems strange why it was not produced in evidence at that stage of the proceedings.

P.W.1 was cross-examined at great length on that entry in Ex. P53. The answers given by him to some important questions are unsatisfactory or contradictory, and are not indicative of his truthfulness and credibility as a witness. For instance, he gave different and inconsistent reasons as to why he made the entry. He stated that he made the entry at 1.40 p.m. because it was important, because of the political condition which was then not stable. He stated it was for him to remember – for his own reference. He said that, when he made the entry, 2nd defendant had had permission to go to the Istana, and he was scared there might be changes later on; that something bad might happen. He said the thing that was bad and was happening was that plaintiff refused to accept the PBS Government. But, on the other hand, when asked whether, at 1.40 p.m. on April 22, 1985, he was scared 2nd defendant would be sworn in as Chief Minister and that plaintiff would not accept the position so that there would be a political crisis, P.W.1 answered that at that time, he did not think that that was so. This contradicts his earlier answer that, when he made the entry, he was scared that there might be changes later on because of 2nd defendant having obtained permission to visit the Istana and that something bad might

happen as a result. Then he switched to the explanation that he was scared that D.W.1 would not admit that he had given instructions "to us". Questioned as to what made him think so at 1.40 p.m., he replied that D.W.1 might not admit. However, he later admitted that he had no basis for thinking so. Then followed the following questions and answers:

"*Q.* What do you say is the reason why you wrote it down?
A. I cannot remember the reason why.
Q. You are saying this is so important that you wrote it down; nothing else in that book was important.
A. Yes.
Q. You cannot give any reason why you wrote it down.
A. Yes.
Q. Why can't you give any reason.
A. It is difficult to give reasons."

If the entry was genuine and not fabricated, why was it difficult to give any reason for making it? In giving these answers, there was nothing to indicate that P.W.1 was confused in any way or did not understand the questions. Hence, these answers cast great doubts on the credibility of his previous answers as to the reason why he made the entry, even if they were to be considered singly, and without comparing them one with the other.

When confronted with all the different answers he gave, he stated that the reason was for him to remember important matters.

Later, when he was asked what made him to think that D.W.1 might change his mind and appoint 2nd defendant, he replied that it was his opinion. He subsequently stated that he knew D.W.1 for a long time and the latter liked to change his mind.

P.W.1 then introduced a new element, as the following question and answer show:

"*Q.* Why did you think, at 1.40 p.m. that TYT would change his mind and swear in Datuk Pairin?
A. At that time, if I am not mistaken, we had received news on the radio saying that Datuk Musa Hitam said that we must follow the majority and democracy."

This answer implies that that was the reason for P.W.1 thinking that D.W.1 might change his mind and appoint 2nd defendant as Chief Minister, but he never mentioned about this earlier on, when he stated that that was his opinion. As stated, he gave different and contradictory answers.

Later, when asked why it mattered to him that D.W.1 might change his mind and appoint 2nd defendant and remove plaintiff, he did not give a coherent answer; and finally stated that he could not explain why. He denied the suggestion that the reason why he could not explain was because he wanted plaintiff to be the Chief Minister, but did not give any other reason.

Taking the most charitable view of the various answers given by P.W.1 as to the reason why he recorded the entry, and bearing in mind that at one stage he did say that it was because he was afraid that D.W.1 might change his mind, his different and contradictory answers as to what made him think so at the time when he recorded the entry, do not indicate him to be a witness of truth, whose evidence on this matter is credible and should be accepted.

The allegation that at between 3.00 a.m. and 3.15 a.m., an invitation over the telephone was issued to plaintiff on D.W.1's behalf by the protocol officer, Jalil, was made known to P.W.1. He was then asked to confirm that what occurred outside his back door was at 2.30 a.m. He replied that it was more or less at that time. By "more or less" he meant between 2.00 a.m. and 3.00 a.m. Further cross-examination secured the answer that it was not at 3.00 a.m. or between 2.00 a.m. and 3.00, but it could be 2.20 a.m. or 2.30 a.m.; and he gave the estimate back at 2.30 a.m. After the adjournment, he reverted to between 2.00 a.m. and 3.00 a.m. It seems clear that, having been informed of the allegation about the invitation made to plaintiff, P.W.1 was modifying his story about the 2.30 a.m. incident as to time so as to bring it nearer to the time when it was alleged that the invitation was made to plaintiff by Jalil. This badly reflects against P.W.1 as a witness.

It is pertinent to note that since P.W.1 has stated that the purpose of Ex. P53 was to record down matters of importance in the course of his duties, he has not satisfactorily explained why, on his own admission, the entry of April 22, 1985 was the only entry of importance in that exhibit. Further, if he saw fit to make that entry, why did he omit to make the entry relating to the alleged conversation at the fish pond, which occurred almost immediately after the events recorded in the entry concerning the 2.30 a.m. incident and was of equal importance. This is also a factor to be taken into account in assessing the genuineness of that entry – as to whether it was recorded on the date alleged, or whether it was fabricated.

There is one other important matter in the evidence of P.W.1 which, in my view, strongly supports the conclusion that the entry was not recorded at the date and time as alleged by P.W.1. In his evidence-in-chief, P.W.1 stated that at about 1.00 p.m., he went home, and returned to the Istana at 1.45 p.m. In cross-examination, on being asked about the broadcast by Datuk Musa, he stated that it was made between 1.00 p.m and 1.40 p.m., by which time he had returned from lunch at about 1.30 p.m. He listened to the radio at 1.30 p.m. Normally, he did not take half-an-hour for lunch. The following questions and answers are revealing:

"*Q.* You said you were sitting in your room, listening to the news, at 1.30 p.m. when the normal news bulletin was broadcast. You heard Datuk Musa's statement in the news; and at 1.40 p.m. you made the entry in your diary?

A. At about that time.

Q. Are you certain in your evidence about this?

A. Yes.

Q. In your evidence in chief on 21/1/86, you were asked by my learned friend Mr. Sri Ram about what time you went home from Istana. You told him at about 1.00 p.m. Then he asked you what time you returned to Istana. You replied at about 1.45 p.m.

A. That was what I remember.

Q. The 2 versions cannot be both correct. The 1st version is that you took your lunch between 1.00 p.m. and 1.45 p.m. and reached Istana at 1.45 p.m.

A. That was what I remember.

Q. But 2nd version was you had a quick lunch; came back at 1.30 p.m. to get ready for Datuk Pairin; listened to news at 1.30 p.m.; and wrote the entry in your diary at 1.40 p.m.

A. That was what I remember.

Q. The 2 versions were quite different. Which one do you like Court to accept?

A. It is up to Court. That was what I remember."

On further questioning his answers were

"What I have told Mr. Sri Ram was 1.30 p.m. I was already wrong." "At that time I could not remember. What had happened I could not remember. What time I got back."

Then he stated that the entry made in Ex. P53 was for his own reference; that he did not tell plaintiff's legal advisers about it; and that it was a secret for himself.

From the evidence of P.W.1 as to the time he wrote the entry, at 1.40 p.m., and the contradiction in his evidence about the time he got back to the Istana from lunch, his evidence about the recording of the entry is deeply tainted, and there is no reason for me to believe him, particularly taken with the rest of his evidence, considered in the light of the rest of the evidence.

In the premises, I find that P.W.1 is an untruthful witness whose evidence on the matter of the entry in Ex. P53 cannot be accepted. I further find, on the evidence as accepted by me, that it has been proved beyond any reasonable doubt, and I am very sure, that that entry was fabricated by P.W.1 in order to corroborate his evidence on the 2.30 a.m. and fish pond incidents, in relation to which, I have rejected his evidence, and I so find. Further, I do not believe P.W.1 when he stated that despite the existence of the said entry which contains such an important piece of evidence, he did not disclose it to plaintiff's legal advisers. It is said that he kept it back because of his loyalty to D.W.1 and because he did not want to hurt the latter. Yet, he had no qualms about giving evidence on other important matters against D.W.1, including his evidence about the 2.30 a.m. incident and the conversation at the fish pond. I need say no more about this.

There is one other matter. If the entry in Ex. P53 was indeed recorded by P.W.1 at the date and time alleged by him, it is pertinent to observe that it should have put his mind at rest about his worry that D.W.1 might or did not intend to admit what happened at the 2.30 a.m. incident. It would have been unnecessary for him to inquire from D.W.8 whether the latter had recorded in the gate diary (Ex. D32) the entry of plaintiff. He could have shown the entry to D.W.1 during the alleged conversation between him and the latter in the presence of the Private Secretary after the receipt of his subpoena, when the latter was alleged to have forgotten about the alleged 2.30 a.m. incident. These are also reasons supporting my finding mentioned above.

From the evidence and for the reasons given, I find that defendants have succeeded in proving beyond any reasonable doubt that the entry of April 22, 1985 in the Red Diary (Ex. D53) was fabricated by P.W.1.

(4) I have concluded, when dealing with the evidence of P.W.3, and for the reasons given therein, that P.W.1 knew beforehand the arrival of plaintiff, although he professed ignorance about it. He had also professed ignorance about the departure of plaintiff after the swearing in, or the plaintiff being furnished with an escort to his house. In cross-examination, he at first stated that he did not remember whether he gave instructions to escort

plaintiff, but later said that he did not give any such instructions. He suggested it might be the Private Secretary, who had the power. I do not regard this answer of P.W.1 to be credible, since the bodyguards and close escorts and their drivers were directly under him. He it was who asked them to be present at the Istana on the evening of April 21, 1985. He knew that plaintiff had been sworn in. He waited at the door for the arrival of the plaintiff. I find it hard to believe that, after the swearing in, he would not have taken steps to find out whether plaintiff had left, and, if not, to see plaintiff off, since D.W.1 had not done so but straightaway went upstairs. I also find it difficult to believe that the bodyguards and close escorts and their drivers would have escorted plaintiff home without instructions – and there is evidence from P.W.3 that those instructions came from P.W.1.

(5) *The Bodyguard Diary (Ex. P60)*

This diary was stated by P.W.1 to have been kept either in his room or in that used by the bodyguards. It was not discovered by the investigating officer into the criminal complaint in connection with the events which occurred at the Istana. It was left to the new ADC to discover it, although it is not in evidence as to where he found it.

In relation to this diary, entries 1168 and 1169 might be said to be an indication that D.W.1, having invited plaintiff to be sworn in, and having sworn him in, was reluctant to see any representative of PBS until he finally decided to see 2nd defendant. However, taking into account the other evidence, including the evidence of D.W.1, D.W.2, D.W.7 and D.W.10 in relation to the appointment of 2nd defendant, I find that this conclusion cannot be arrived at.

As to Entry 1172 relating to the instruction of the Private Secretary regarding the temporary suspension of the swearing in of the USNO Cabinet, there is no evidence to link this instruction to D.W.1. Indeed, the evidence shows that it was the Personal Assistant to Datuk Harris who communicated to the Private Secretary about the swearing in of that Cabinet.

It should be noted that, on the evidence of P.W.1, this diary is not complete, nor that everything which should have been entered in it had been recorded. Further, it is his evidence that some of the entries made had been shortened.

I shall make further comments on this diary later in this judgment as and when necessary.

(6) *Evidence of D.W.1*

I had earlier dealt with his evidence. He was subjected to lengthy and strenuous cross-examination. I find that, despite the inaccuracies, mistakes, inconsistencies and contradictions in his evidence, he stood up well in cross-examination. I have taken into full consideration the written submission of LCP on the matter and his submission regarding the evidence of D.W.1. I do not propose to list out all such mistakes, inaccuracies, inconsistencies and contradictions but have taken them into account including those in his written defence, taken in the light of his evidence.

Having regard to my observations above, I do not find that the inaccuracies, inconsistencies and contradictions between the evidence of D.W.1 and his pleadings indicate that he is not an honest or truthful witness. As to his pleadings, taken in the light of his evidence, it should be borne in mind that, in his evidence, D.W.1 had stated that he had not closely studied them. He had also not stated that he fully understood them. Further, he also said that he gave a full proof of evidence to LCD only after the latter's arrival. However, the main issues appear to be clear.

It was submitted that in view of all these factors, and his garbled defence, with confusion as to times and sequences on the happening of events, and his inability to remember events at the Istana, he is not a credible witness and a witness whose evidence should be accepted. In assessing his credibility and evidence, I had also watched his demeanour when giving evidence, and had taken into account his age, and his mental and physical state at the material times. Taking all these factors into consideration, in the light of the submission of LCP, I find D.W.1 to be an honest witness, and the inaccuracies, inconsistencies and contradictions and failure at times to recall events or the mistakes about them, do not affect his credibility as a witness in relation to the matters under discussion. I accept his evidence that, when he expected the arrival of Datuk Harris, he was surprised and taken aback when he saw D.W.2 and D.W.7 instead in his office. I also accept his evidence, corroborated by the evidence of D.W.2 who I find to be a straightforward, honest, independent and truthful witness, that he agreed with D.W.2 and D.W.7 that, in the circumstances, when Berjaya and USNO did not have a majority of elected seats, it would be

improper and unconstitutional to appoint plaintiff as the Chief Minister. Further, the evidence of D.W.2 which I accept, that it did not appear to him that D.W.1 was going to appoint plaintiff, and his observation that the latter was then in bush jacket at his office, corroborates the evidence of D.W.1 that he did not decide to appoint plaintiff.

For all the reasons given, and on the whole of the evidence and bearing in mind the burden of proof, and on the evidence as accepted by me, I find that plaintiff did not enter the Istana on the invitation or with the permission of 1st defendant.

I(b) *Did 1st defendant decide to appoint plaintiff as Chief Minister before the latter's arrival?*

After considering the whole of the evidence, and on the evidence as accepted by me, and for the same reasons as given under item I(a) above, and not forgetting the burden of proof, I also find that the answer to the question posed under this item is in the negative, after finding that there is a case to answer by plaintiff. In this connection, I have rejected the suggestion put to D.W.1 about the alleged telephone conversation with Datuk Harris before the arrival of plaintiff for the reasons already given; and also the alleged conversation with Dr. Ya'acob Merican in the Private Secretary's room. I have also rejected the suggestion that, on the instruction of D.W.1, the protocol officer Jalil telephoned an invitation to plaintiff to come to the Istana to be sworn in. With regard to the presence of Sukarti at the Istana, although the evidence of P.W.1 and P.W.3 would appear to indicate that the Private Secretary came as a result of a message delivered to him by P.W.3 on the instructions of P.W.1, following a phone call to P.W.1 by Datuk Herman Luping, there is no evidence to show that Sukarti came as a result of instructions from D.W.1. Indeed, D.W.1 in his evidence, which I accept, stated that he was surprised to see the Private Secretary at about 2.15 a.m., which is contrary to any view that Sukarti came because D.W.1 instructed him to do so.

The visit of the two ladies and their subsequent visit with a third one is no evidence against D.W.1 that he had decided to appoint plaintiff as Chief Minister before the latter's arrival. Indeed, D.W.1's evidence shows that he did not invite them to the Istana; and in respect of the two ladies, they came with a note purportedly written by plaintiff addressed to the gate guards. They came in a car driven by Jalil, but the circumstances under which this came about are not known; nor is it known from where Jalil had come.

As to the instrument of appointment, the evidence shows that Ngui Thien Soong (D.W.14) brought the instrument of appointment with the name of Datuk Harris in it, to the Istana shortly before the arrival of plaintiff on the instructions of Jalil, who has not been called. There is no evidence to indicate that Jalil was then acting on the instructions of D.W.1, and D.W.1 was not cross-examined on the matter.

Another matter to emphasize is the evidence about what transpired when D.W.2 and D.W.7 came to the Istana, and the conversation between them and D.W.1 which has been dealt with earlier.

In reaching my conclusion, I have also considered the evidence on events occurring after the swearing in, with which I shall deal under item (III) below.

I further find, on the evidence as accepted by me, including the evidence of D.W.1, D.W.2, D.W.7, D.W.8 and D.W.9, taken with the rejection of the evidence of P.W.1, P.W.2 and P.W.3 on the matters under discussion, and for the reasons already given above, that the entry of plaintiff was made without the knowledge or connivance of D.W.1; and that P.W.1, P.W.3 and P.W.4 were knowingly involved in enabling plaintiff to obtain such entry.

It was submitted that, if the entry of plaintiff was unauthorized, this would have meant that D.W.2 and D.W.7 would have gone to the Istana on a fool's errand. To my mind, this presupposes that what, according to the evidence of these two witnesses, Datuk Harris told them was true, as distinct from their taking it to be true. The evidence indicates that they took the information and instructions given to them at its face value; and that they did not question the correctness of the information as it is not for them to do so. There is no evidence to show that the information was true. Indeed, on the evidence as accepted by me, I find that such information is contrary to its being true. However, even on the basis of such information being true, and taking into account the respective official positions of D.W.2 and D.W.7 in relation to Datuk Harris at the material time, and their connection with him – the former being also a Berjaya supporter; and the latter, related to him by marriage, and their knowledge about the character of Datuk Harris, it is in my

view a reasonable inference that he would not expect them to question the correctness of the information or the instructions given by him. This was in fact what happened, when these two witnesses met D.W.1 at his office. They concerned themselves with telling D.W.1 about the state of the political parties and the constitutional position about the appointment of the Chief Minister, which was what Datuk Harris certainly did not expect them to do.

The point was also made as to what would happen if, after plaintiff's entry, D.W.1 were to say to him and his supporters: "There must be some mistake", and it was suggested that this would have the effect of causing them to go away humiliated. In this connection, there is unchallenged evidence that D.W.1 is a polite and considerate gentleman who would hardly act in the manner as suggested. His evidence, which I accept, is that, despite his surprise at the unauthorized entry of plaintiff and his supporters, he entertained them in his office. The evidence shows that it would be wholly out of character for D.W.1 to have sent away plaintiff and his supporters, humiliated, in the circumstances. Further, the evidence of D.W.1 which I also accept, is that, knowing the position and standing of plaintiff in the State, and the respect with which he is regarded, particularly among the Suluks, if he were to enlist the aid of the police and send plaintiff away, it might in his view result in violence and bloodshed, something which he wished to avoid.

I do not regard that what he stated to the State Legislative Assembly subsequently, to be inconsistent with this view, taking into account his evidence on the matter.

I do not consider therefore that these factors are in favour of the view that plaintiff's entry was not unauthorized. For the reasons given, I find that 1st defendant did not decide to appoint plaintiff as Chief Minister before the latter's arrival.

II *Circumstances under which plaintiff was sworn in by 1st defendant; and whether swearing in has legal effect.*

I had found, for the reasons given, that D.W.1 did not invite plaintiff to the Istana; nor did he decide to appoint plaintiff as Chief Minister before the latter's arrival. It is necessary to consider whether, after plaintiff's arrival, D.W.1 changed his mind and decided to appoint and swear in plaintiff as Chief Minister. This would involve consideration of the evidence regarding the events which occurred after plaintiff's arrival at the Istana. In doing so, I also bear in mind the evidence on the events which occurred before and after entry, and after the swearing in and departure of plaintiff.

The events concerning the state of mind of D.W.1 before the plaintiff's entry were these, on the evidence: he had received two telephone calls from Datuk Lim Guan Sing, which surprised him. At about 2.15 a.m. he was informed by P.W.1 that Datuk Harris wanted to see him. Shortly after, he saw his Private Secretary in a tie without a coat, which surprised him. He went upstairs, changed into a bush jacket and brought along his revolver and kris. As stated, they play no significant part in these proceedings. On coming downstairs, expecting to meet Datuk Harris, he instead saw D.W.2 and D.W.7, which surprised him. Shortly after, plaintiff and his supporters arrived.

The atmosphere in the Istana was described by P.W.1 as normal. In contrast, both D.W.2 and D.W.7 felt that there was tension. On this, I prefer the evidence of D.W.2 and D.W.7 to that of P.W.1.

With regard to the events which occurred after that in the Istana building, it is clear from the evidence of D.W.1, D.W.2 and D.W.7 that the latter two witnesses were asked by D.W.1 to go to the Private Secretary's room, while D.W.1 remained in his office to entertain plaintiff and some of his supporters.

The evidence of D.W.2 and D.W.7, both of whom, as I have stated, I consider as entirely honest, truthful, straightforward and impartial witnesses whose evidence I accept, shows that when they entered the Private Secretary's room, it was not occupied. D.W.1 might later have come in, and then went out again. Then D.W.1 came into the room, followed by Datuk Yahya Lampong and Datuk Majid Khan, the former a prominent member of USNO and the latter a well-known Berjaya supporter. In cross-examination, none of the defence witnesses agreed with the suggestion that during the initial stage, Datuk Yahya Lampong was coming in and out of the Private Secretary's room to telephone. On the evidence of D.W.1, D.W.2 and D.W.7, as accepted by me, it is clear, and I find as a fact, that throughout the arguments which ensued thereafter, Datuk Yahya Lampong played a leading role, and to lesser extent, Datuk Majid Khan, both of whom argued persistently, and aggressively at times. I also find as a fact, on the evidence as accepted by me, that Datuk Malek Chua, a member

of Berjaya, at some stage of the arguments, took part in them, though to a lesser extent.

It was suggested that, on the allegation that, in view of his position as a supporter of Berjaya and his official position as State Attorney whose wrongful advice had landed D.W.1 in his present predicament, D.W.2 might not be an impartial witness whose evidence has to be examined with care. I have considered this suggestion. I have the clear impression, and have come to the no less clear conclusion, without any hesitation whatsoever, that D.W.2 stands out prominently as an entirely independent, impartial, truthful and honest witness, and I accept his evidence.

I find, on the evidence of D.W.1, D.W.2 and D.W.7 as accepted by me regarding the arguments in the Private Secretary's room, that it went on for about 1½ to 2 hours, heated at times; and as stated, Datuk Yahya Lampong and Datuk Majid Khan arguing persistently and aggressively at times; that Datuk Yahya Lampong was then representing plaintiff; that for most of the time, except for one or two occasions when he went out of the room, D.W.1 sat quietly and patiently, listening to the arguments in front of him but took no part in them; and that D.W.7 took a small part in the arguments. It is common ground that at about 4.00 a.m. D.W.2 went to fetch an up-to-date copy of the Sabah Constitution (the Constitution) and returned to the Istana at about 4.30 a.m., after which the arguments continued in the presence of D.W.1. I also find that the main part of the arguments was centered on the matter of nominated members of the Legislative Assembly, and one of the matters argued was whether they may be used for the purpose of inflating the number of seats held by USNO and Berjaya, and making an appointment of a Chief Minister by the Head of State under Article 6(3) of the Constitution. It seems clear from the evidence that, whereas D.W.2 and D.W.7 took the view that the nominated members could not properly and constitutionally be considered for that purpose, Datuks Yahya Lampong, Majid Khan and Malek Chua argued otherwise.

It should be noted at this stage that at the time of the arguments, the full results of the election had not been officially announced; it is not entirely clear whether the full results were unofficially known; but the arguments proceeded on the basis that USNO had secured 16 elected seats; Berjaya 6, and PBS 26, including one seat held by Parti Pasok the incumbent of which was said to have joined PBS.

There is uncontroverted evidence, and I find as a fact, that at the time of the arguments, D.W.1 did not personally know the full results of the election, beyond what he was said to have been informed by D.W.2 and D.W.7.

It was submitted that the arguments were caused by D.W.2 attempting to persuade D.W.1 against his decision to appoint plaintiff as the Chief Minister; and Datuks Yahya Lampong, Majid Khan and Malek Chua were merely arguing against D.W.2 and D.W.7 in support of the decision of D.W.1. With respect, on my findings on the evidence, nothing could be further from the truth. My earlier findings were that the entry of plaintiff was unauthorized, and that D.W.1 did not decide to appoint plaintiff before his entry. All the facts, as disclosed in the evidence accepted by me, point to one way only: that the arguments arose because of the attempt made by the three USNO and Berjaya Datuks, to show, in front of D.W.1, that the Head of State could constitutionally appoint plaintiff as the Chief Minister and for this purpose, could constitutionally take into account the nominated members, a view strongly resisted by D.W.2 and D.W.7. I find this as a fact.

As to the mental and physical condition of D.W.1 when all the arguments took place before him all this time, I accept his evidence when he said:

> "During the period of 2 hours or so, while they were arguing, both Datuks Majid Khan and Yahya Lampong, were looking at me. But most of their attention was directed at the State Attorney. At that time, I was tired – since from morning till night (I had travelled). I was very, very tired, and I felt sleepy. My mental state then was that I could not concentrate because of strong pressure; at that time I could not think properly and I could not also think of what to do."

In this connection, I also accept the evidence of D.W.7 where, after referring to D.W.1 saying something like: "Mari lah kita sumpah Tun Mustapha", after D.W.2 and Datuk Charles Ho had left the room, he stated:

> "When TYT said that, all I can say is this: I think TYT had a bad time. First, he had been on the move, in and out of K.K. since March 3, 1985, and the last time he went, before 22nd was April 17, 1985, and came back on April 18, 1985 – that's one thing. Second thing, with the argument going on in his presence, to my mind, he was not given sufficient time to evaluate and think straight, and probably also the effect of the paper which I did not see."

I shall deal with the matter about the "paper" later. What I have stated clearly shows that, when

the arguments took place before him for no little time, he was definitely mentally and physically very tired, so much so that he could not think properly; and it is in such a physical and mental state that he said: "Mari lah kita sumpah Tun Mustapha." Later, D.W. 7 stated:

"Until to-day, I could not find any good reason why TYT should swear in Tun Mustapha, which he did."

As to the arguments being made in the presence of D.W.1, D.W.7 said:

"I also felt it would be improper to argue and discuss about the appointment of the C.M. in the presence of the Head of State as if we were bargaining in a bazaar. To me, the Head of State should be given sufficient time to evaluate the information or advice given to him. That was why I did not participate actively in the discussion. I did not see any point. As far as I can remember, the Head of State did not at all participate. He just kept silent."

The evidence of P.W.7 also shows that, at some stage of the arguments before him, and after the mention of the 6 nominated members by someone, D.W.1 said: "Ada kah kamu list orang itu. Siapa dia orang." Also, at a subsequent stage, he asked whether Kuala Lumpur had agreed, to which someone said: "Yes, yes." When D.W.7 suggested that confirmation be obtained about this by telephone, Datuk Majid Khan said: "Tidak payah, Tun. Datuk Harris sudah contact Dato Musa", whereupon D.W.1 said: "Kalau begitu, tidak apa." This part of the evidence of D.W.7 was not challenged. In this connection, it is clearly and grossly misleading to allege that agreement had been obtained from Kuala Lumpur by Datuk Harris after contacting Dato Musa, since, according to the agreed statement of Dato Musa (Ex. D45), Datuk Harris did not contact him until 3.40 a.m., and from the same statement, no agreement had been given by him to Datuk Harris to the proposed coalition between USNO and Berjaya.

D.W.7 also in his evidence stated that not long after this, D.W.1 threw the following question into the air, and not at anyone in particular: "Ada kah kita hakim." In this connection, D.W.2 had deposed that it was D.W.7 who had asked him to get a judge. I attribute this to both witnesses giving evidence on events as each remembered them, and any contradiction does not detract from their standing as honest and truthful witnesses. Both D.W.2 and D.W.7 had given evidence that it was difficult to fathom what was going on in D.W.1's mind generally. Both did not testify about the reason for the request of D.W.1 for a judge. It was submitted that this is consistent with the decision of D.W.1 to appoint plaintiff. However, the evidence of D.W.1 which I have no reason to doubt, was that he made the request in order to seek further legal advice. This advice the learned judge gave and it was not favourable to the plaintiff (see his affidavit Ex. D10, paragraph 5).

As to "Mari lah kita sumpah Tun Mustapha" referred to above, which D.W.7 stated that D.W.1 had said, D.W.7 did not state why D.W.1 made this statement.

Considering all that was said by D.W.1 and other defence witnesses mentioned above, in connection with the incident regarding the arguments in the Private Secretary's room, taken in the light of the whole evidence, I do not find that they show that D.W.1 had made up his mind to swear in plaintiff in exercising his judgment in accordance with the Constitution.

I now come to deal with the evidence concerning the piece of paper. The evidence shows that it was produced to D.W.1 by Datuk Yahya Lampong as the learned judge Datuk Charles Ho was on his way out from the Private Secretary's room (see paragraph 8 of Ex. D10 and the evidence of D.W.2).

How the paper was presented to him by Datuk Yahya Lampong, its contents, and the effect it had on D.W.1, are disclosed in the evidence-in-chief of D.W.1 as follows:

"Datuk Yahya Lampong showed me a piece of paper. The size of the paper was about 6 inches by 2½ inches (demonstrates by folding piece of paper, which was measured). I could not ascertain whether he wrote anything on the paper before he showed it to me, because at that time I was facing Datuk Nicholas Fung. He handed it to me with both hands (demonstrates) while I was seated. He was standing. At that time Datuk Nicholas Fung was at the place in Ex. D6 which I now mark with an 'O'.

When I received the paper, I did not say anything. I took it and was reading it. The contents were written in English. If I am not mistaken, there were 3 lines. It was easy for me to read the writing. What I read I remember. I read: 'We will have no confidence in you and will remove you.' At this stage Datuk Nicholas Fung jumped up and tried to see the piece of paper. Suddenly, Datuk Yahya Lampong snatched the piece of paper from my hand and tore it to pieces and put them into his pocket. When it was snatched from me, I had not finished reading the paper.

From my reading of the paper, aside from being frightened I could also feel blood rising to my face.

When I read the contents of this piece of paper and when it

was snatched away by Datuk Yahya Lampong, I felt frightened and also felt blood rising to my face. I was thinking about the word 'remove', because that word in English has many meanings; but at that time, my understanding of the word was that I would be removed from my position as the TYT. I was thinking about how they were going to remove me. If they were going to use the law, they were not the ones who governed the State. So if they were to use legal means, they could not do so. So in my opinion, the word 'remove' had only one meaning, from my understanding of that word; that is, to remove me physically. From my judgment, that was the only point, that it is to kill me, because if they were to go to the Constitution, they could not do so.

Besides fearing for myself, I was also fearing for the safety of my family, because not only Toh Puan was there, my daughters, my son and daughters-in-law and grandchildren were also at the Istana. I did not move about, but I was thinking of what I should do. I did not relate or tell this to anybody because I was still at my Private Secretary's office. So I was thinking about the advice given by Datuk Charles Ho and also the reply by Datuk Yahya Lampong. This came into my thoughts when I was given the piece of paper by Datuk Yahya Lampong. It came into my mind that Datuk Yahya Lampong dared to give that kind of note, and the kind of man he was. I was thinking of the incident during the campaign at Kota Belud when Datuk Yahya Lampong discharged his firearm at a gate at a kampung at Kota Belud. Because of this, it came into my mind about what was the solution, because firstly, when they came up to the Istana, they wanted to force me to appoint Tun Mustapha."

D.W.2's evidence, which I accept, shows that, when he got up from his seat to see the contents of the paper, he was blocked by Datuk Yahya Lampong, who then snatched away the paper from D.W.1.

In cross-examination, D.W.1 stated that, at the time the paper was shown to him, he could have got all the police force to the Istana in 15 minutes but he did not want them to come, because they might cause trouble. The following questions and answers appear in cross-examination:

"*Q.* If you were right, the words did not look like a death threat.
A. Yes, if it goes according to the words. But we must also know the reason.
Q. The sentence contains the word 'will'.
A. At that time, I could not understand the intention and while I was still thinking about the meaning of the sentence, the paper was snatched away. When Datuk Nicholas Fung tried to see the note in my hand, it was immediately snatched away by Datuk Yahya Lampong.
Q. Did you really get a good look at the message?
A. I did see. If not, I can never repeat the words to-day."

After references to Article 1 of the Constitution –

"*Q.* If the sentence had gone further on: 'as the Yang di-Pertua Negeri', then it would certainly look like a reference to Article 1.
A. Yes, probably.
Q. And you would not have thought it was a death threat.
A. Yes, if the person who said this is a member of the Cabinet. But the person who said that was Datuk Yahya Lampong and they were not in the Cabinet and they had not formed anything as yet.
Q. If the sentence had read: 'remove you as the Yang di-Pertua Negeri', this would have been a reference to Article 1.
A. That may be so, but that person did not have the power.
Q. Are you seriously saying that, if someone used the words of Article 1, it means he was going to kill you.
A. I am serious, because the person who said that at the time had no power.
Q. If the words 'as the Yang di-Pertua Negeri' were there, it would not sound like a death threat, would it?
A. That is correct, if the person who said that had power and they were in the Cabinet."

It was submitted that, whereas the defence of the 1st defendant alleges that the words "as the Yang di-Pertua Negeri" appeared in the paper, these words were omitted from the evidence of D.W.1, and that he had conveniently forgotten to mention such words in his evidence; that this was due to the fact that "shall remove you" could mean many things, but "shall remove you as TYT" can mean only one thing, namely a removal from office, not removal from the world of the living. In this connection, the answer, in my view, is that, although D.W.1 did not mention the words "as the Yang di-Pertua Negeri" in his evidence, he nevertheless took the passage in the paper read by him as meaning that he would be removed as the TYT. This is shown by the following passage in his evidence in chief in reference to the word "remove": "But at that time, my understanding of the word was that I would be removed *from my position as the TYT.*" (emphasis added). Hence, whether or not the words "as the Yang di-Pertua Negeri" were mentioned by him in his evidence would, in the circumstances, make no difference to his understanding of what he stated to be the meaning of the word "remove".

The Datuk Yahya Lampong version was then put to D.W.1. That version reads: "The Constitution empowers the Governor to use his discretion to appoint a Chief Minister, and he need not listen to anybody's advice. This is according to Articles 6(3) and 10(2)." This was denied by D.W.1. Datuk Yahya Lampong has not given evidence on this version. Taken in the light of the evidence on the matter, especially that of D.W.1 and D.W.2, this version, as put to D.W.1, cannot be believed for the following reasons:

(1) Its contents are similar to the arguments put forward by Datuks Yahya Lampong, Majid Khan and Malek Chua against those of D.W.2 and D.W.7. There was nothing new in it. Why should Datuk Yahya Lampong repeat what he had earlier openly put forth in argument before D.W.1. It is said that this was in deference to the presence of the learned judge who had expressed a contrary view on the issue. But it is to be observed that it was when the learned judge was about to leave the room that the paper was produced. He did not stay to see what it contained.

(2) D.W.2 stated in evidence which I believe, that after D.W.1 read what was in the paper before it was snatched away, D.W.1's face fell and there was a distinct change of facial expression. D.W.1 deposed that after reading what he had read, he felt frightened and also felt blood rushing to his face. If the contents of the paper were as suggested, it would not have produced such a reaction from D.W.1.

(3) If the contents of the paper were as suggested, it is incredible that Datuk Yahya Lampong would have snatched it away and torn it when D.W.2 moved forward to have to look at the paper, and for Datuk Yahya Lampong to have blocked D.W.2 and prevented him from seeing it.

From plaintiff's point of view, the Datuk Yahya Lampong version, if true, is helpful to his case. Why Datuk Yahya Lampong is not called to give supporting evidence is not known. In the circumstances, I consider it justified to apply the presumption under section 114(g) of the Evidence Act, 1950 against plaintiff. I therefore reject the version put to D.W.1 in cross-examination.

On the matter of the "paper" under discussion, and in the light of evidence as accepted by me, including the evidence of D.W.2, I make the following findings of fact:

(1) It has been proved beyond any reasonable doubt by defendants that the paper contained the words as stated D.W.1.

(2) That he understood it to mean, rightly or wrongly, that he would be killed.

(3) That, as observed by D.W.2, after his reading of the paper before it was snatched away, D.W.1's face fell and there was a distinct change of facial expression. It was put to D.W.2 that there was a probability that this change of facial expression might be linked to the mention of bloodshed by the learned judge and Datuk Yahya Lampong earlier on; but D.W.2 stated that he distinctly saw what he had stated.

(4) That, viewed objectively, the words in the paper, as found by me, were intended by Datuk Yahya Lampong as a threat to D.W.1 to appoint plaintiff, to bolster his argument with D.W.2 and D.W.7 earlier.

It is said that it is baffling how any reasonable man could seriously regard the words in the paper as a threat to remove him from the face of the earth. But we are here concerned with whether, on the evidence, that was what D.W.1 construed the words to mean in relation to himself as Head of State, in the light of what he then regarded as the situation, and also taking into account the status of Datuk Yahya Lampong and remembering what he had heard about the latter's conduct at Kota Belud, and of what he knew generally of the character of Datuk Yahya Lampong. Whether, viewed objectively, it was a reasonable conclusion or not does not alter such a conclusion of D.W.1.

My findings on the paper have to be considered together with the rest of the evidence regarding the circumstances under which plaintiff was sworn in.

It is said that, before the mention of bloodshed by Datuk Charles Ho and Datuk Yahya Lampong, D.W.1 did not feel frightened, as shown by his evidence. D.W.1 stated that although he felt frightened before, he did not show it. In further cross-examination, he stated that he was already frightened when the people came into his office, but he did not show it; and "I was already frightened when they invaded the Istana. I felt extremely frightened after what I heard was said by Datuk Charles Ho. I did not at all invite these people to the Istana." Then,

> "*Q:* ... Do you accept that you have twice told the Court that you were not frightened before Datuks Ho and Yahya Lampong said something?
> *A:* Whether I accept or not, my statement is there already. But if I forgot to give evidence that I was frightened before that, I do accept that I had twice said that I was not frightened before Datuk Ho and Yahya Lampong said something ..."

Earlier, he had stated that he was frightened of plaintiff's supporters and that made him frightened of plaintiff also. In assessing the evidence of D.W.1 on this matter, it is to be borne in mind that, from the evidence of D.W.2, D.W.7 and even P.W.1, it is difficult to fathom what was going on in the mind

of D.W.1. He is a person who does not show how he felt. From the evidence, it is in my view reasonable to conclude that, when plaintiff entered the Istana without his invitation or permission, as I have found, and taking into account his mental and physical condition, to which I have referred, D.W.1 must at least have felt agitated, worried, confused, and unable to think properly. In this state of mind, he was further frightened after he heard mention of the word "bloodshed". This, taken with the arguments before him, sometimes heated, and with Datuks Yahya Lampong and Majid Khan at times aggressive, and the effect of the contents of the "paper" on his mind, must have taken a great and harmful toll on him, as far as his mental state is concerned. He was then also very physically tired, and unable to think properly. It is in such circumstances, as a continuing process, that the evidence of D.W.7 about his asking for particulars of the nominated assembly members, his questioning about agreement from Kuala Lumpur, his asking for a judge, and his remark "Mari lah kita sumpah Tun Mustapha", and his answer to D.W.2 when the latter, before leaving advised him not to appoint plaintiff: "I know, I know. Tidak apa, lah", should be viewed. Under such terrible mental and physical state, and faced with the presence of plaintiff as well as his supporters who appeared determined to have their way, he had to make a decision. I believe him when he said in evidence-in-chief:

"It did enter into my mind to call the police. I myself had the intention to ask them to go away myself. I am very familiar with Tun Mustapha and I did not respect him as a person; but because of his title 'Tun', if I chased him away from the Istana, and his supporters respected him very highly, and also the public and the Suluk race; if they knew that Tun Mustapha was chased away from the Istana, there was a possibility of unrest and bloodshed. If I ever called the police for assistance, the police would take drastic action to remove them from the Istana; and I also believe that it would cause unrest and bloodshed. So, as a Yang di-Pertua Negeri, my responsibility is to keep peace and not to let trouble (pergaduhan) occur. I wanted to keep the peace and did not want any such incident to occur – the most important thing is not only at the Istana, but also outside it. I thought about it fully: the words which were said by Datuk Charles Ho and the advice given by Datuk Nicholas Fung about the law; and the advice given by the State Secretary that according to the Constitution, Tun Mustapha could not be appointed as Chief Minister. So to avoid the trouble and bloodshed, I found my own solution."

It is now known what the solution was.

Whether the subsequent swearing in of plaintiff was faked (as claimed by the defence) or not (as claimed by plaintiff), I find that, on the evidence as accepted by me, 1st defendant swore in plaintiff because of the continuous pressure in the form of the unauthorized entry of plaintiff, and the subsequent lengthy arguments made before him by the agents or supporters of plaintiff and Berjaya with each insistence, persistence and vehemence; his being threatened by Datuk Yahya Lampong in the form of the contents of the "paper" and the effect thereof on his mind; his fright on the mention of the word "bloodshed" by both Datuks Charles Ho and Yahya Lampong; and his fear of violence and bloodshed were he to send plaintiff away, with or without police assistance. This is certainly not an act made willingly and as a result of the exercise of free will.

One thing is clear from the evidence: plaintiff and his supporters, particularly Datuk Yahya Lampong and Berjaya supporters, Datuks Majid Khan and Malek Chua, never expected to be faced with the problem of having to have an argument with D.W.2 and D.W.7 after they arrived at the Istana. This is not because D.W.1 had invited or permitted them entry into the Istana, as I have found, but because the evidence, including the "*Asiaweek*" article, reference to which will again be made later, shows that they expected to encounter no difficulty after their arrival. I have earlier commented on the information and instructions given to D.W.2 and D.W.7 by Datuk Harris, who expected them to accept his information and instructions without demur, and not to raise any problem or difficulty in connection therewith. I think he was relying too much on their loyalty to him, and did not reckon with their strength of character and sense of fairness and justice. As for plaintiff and his supporters, I find on the evidence as accepted by me that, when they went to the Istana, they did so with the notion that, come what may, plaintiff must be appointed and sworn in as Chief Minister.

I also find, on the evidence as accepted by me, that, were it not for the pressure, fright and threat I have mentioned, D.W.1, as Head of State, would not have sworn in plaintiff. I also find that, before swearing in anyone as Chief Minister, D.W.1 as Head of State, wanted to know the official results of the election first. The evidence shows that he is obviously deeply conscious of his duties and responsibilities under the Constitution. I believe the answers of D.W.1 in the following questions and answers:

"*Q.* During the time Tun Mustapha arrived and for about 1 hour or more, what was in your mind as to how to deal with the situation?

A. My intention from the first was not to appoint him as Chief Minister.

Q. What were you planning to do from the first?

A. My plan from the first was, if not for the persuasion and threatening, I would sit there until morning. 6.00 o'clock in the morning is considered daytime already.

Q. What were you expecting to happen then?

A. For sure, at that time, there would be communication from K.L. and election commission; and by then, they would have received the first results of the election.

Q. What about Tun Mustapha, who would have waited for 2 hours or more?

A. That is easy because it is daytime already. So I can ask from the election commission about the election results. If by that time Tun Mustapha and his supporters were still persuading me, I could make a telephone call to Kuala Lumpur.

Q. What would you say, and to whom, in Kuala Lumpur?

A. To the highest authority. At that time Dato Musa who was then Acting P.M.".

In the premises, I find, on the evidence as accepted by me, that, in swearing in plaintiff, 1st defendant did not exercise his judgment under the Constitution, in that –

(1) He did not take into account the post-election position of PBS, as he was waiting for the official election results to be declared. In other words, I find on the evidence as accepted by me, that, contrary to what he was required to do under Article 6(1) of the Constitution, D.W.1 did not take into account the actual number of elected seats won by PBS, because he was at all material times waiting for official results to be announced.

(2) Such a swearing in was made solely as a result, cumulatively, of the pressure and threat mentioned earlier operating on his mind, and when he was frightened and confused in mind and tired physically, and when he was unable to think properly.

In reaching this conclusion, a distinction should, in my view, be drawn between the situation where the evidence, as accepted and found by the Court, discloses that no judgment has been made under Article 6(3) of the Constitution, a matter which falls within the province of the Court to decide; and one where such evidence shows that a judgment has been made (which I do not find), albeit allegedly not properly made. In the latter case, the authorities cited would appear to indicate that the matter is not reviewable.

In this connection, reference may be made to the Indian case of *State of Rajasthan* v. *Union of India.*[1] In that case, several States challenged the dissolution of various State Assemblies by the President of India. The power of dissolution was exercised under Article 356(1) of the Indian Constitution, and a challenge was made against the President's decision. In his judgment, Beg C.J. said (page 1377, para. 35):

"This Court has never abandoned its constitutional function as the final judge of constitutionality of all acts purported to be done under the authority of the Constitution. It has not refused to determine questions either of fact or of law so long as it has found itself possessed of power to do it and the cause of justice to be capable of being vindicated by its actions .....";

(page 1389, para. 75):

"..... If it is actually stated on behalf of the Union Government that an action was taken on a particular ground which really falls completely outside the purview of Art. 356(1), the proclamation will be vitiated, not because the satisfaction was challenged or called in question on any ground but because it was admitted to be on matters outside Article 356(1)."

In his judgment, Chandrachud J. (page 1400, para. 126), after referring to certain warning contained in "This Honourable Court" by Leo Pfeffer, Indian Reprint 1967, p. 7, said:

"This is a warning well worth remembering but it must not deter the Courts from discharging their functions if they find that a constitutional power meant to be exercised for preserving democracy is being used for destroying it."

Here, even if it can be said that, in the circumstances as found by me, by swearing in plaintiff, 1st defendant had exercised his powers under Article 6(3), the circumstances under which he exercised the power clearly indicate that he has done so not for preserving democracy, but for destroying it. In his judgment, Bhagwati J. (at page 1413, para. 143) said:

"..... So long as a question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so."

With the greatest respect, I would add that it would also be the constitutional obligation of the Court to decide whether a power under the Constitution has been exercised at all. Later, at pages 1414-1415, para. 144, the same learned judge stated:

"..... The satisfaction of the President is a condition precedent to the exercise of power under Art. 356, Cl. (1) and if it can be shown that there is no satisfaction of the

President at all, the exercise of the power would be constitutionally invalid. Of course by reason of Cl. 5 of Art. 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground, but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or unjustified, *but there is no satisfaction at all. In such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself.*" (Emphasis added).

Here, I have to consider, not whether the judgment of the Head of State has been properly exercised, but whether there was any judgment made at all under Article 6(3), and in this respect, I draw no distinction between the "satisfaction" of the President in the Indian case cited, and the "judgment" of the Head of State in the instant case.

Here, according to my finding on the facts, I am concerned with the first situation, and I consider that it is not outside the jurisdiction of the Court to examine the evidence and decide on it.

I further consider that it is open for the Court to make the above finding under the pleadings as well, particularly taking into account para. 3 of the Statement of Claim and paras. 2 and 2A of the re-amended defence of 1st defendant.

I shall deal with Ground (1) of the above finding. I have earlier stated that I accepted the evidence of D.W.1 when he stated that, if it were not for the persuasion and threatening, he would sit until morning and wait for the official election results to be announced. Although D.W.2 in his evidence, stated that he had told D.W.1 what he understood to be the unofficial results, as far as PBS was concerned, the evidence of D.W.1, which I accept, shows that he had no clear recollection of this. This indicates that he could not have taken the PBS position into account at the material time. I do not consider that D.W.1 was being evasive, vague or not telling the truth with regard to his evidence on the matter. Further, his inability to recollect the matter clearly is, in my view, consistent with it having occurred because of his then physical and mental condition mentioned above, and as found by me. The relevant part of the evidence of D.W.1 is contained in the following questions and answers in cross-examination:

"*Q.* Before Tun Mustapha arrived, you knew that PBS had 25 seats, plus 1 seat from Pasok.

A. I did not know. The Commissioner of Police informed me, if I am not mistaken, the PBS secured 16 seats. Probably there was more. But if at that time PBS had won 25 seats plus 1 seat from Pasok, I did not know that.

Q. Are you seriously saying that, at the time of Tun Mustapha's arrival, or soon after, you did not know that?

A. Yes.

Q. You did not know the USNO and Berjaya results.

A. I was informed by the Commissioner of Police, but I could not remember. At the time I was in Private Secretary's room, I did not know that PBS had won 25 plus 1 seat from Pasok. I was not officially informed of this. When the argument arose in my Private Secretary's office, I heard they were talking. After I heard the State Attorney talking about the seats won by PBS, but this information was not official. (Referred to para 3 of defence). Probably I forgot about the number of seats won by PBS. They did not inform me that PBS won more seats than other parties at the time. So I did not pay much attention to the information.

Q. Did anyone ever tell you that as a final result, PBS had a majority of seats.

A. I got to know the final results early the next morning, but at the time, I did not know the results of 2 constituencies, Tempasuk and maybe Buang Sayang – I could not very well remember.

Q. Were you told at Private Secretary's office, that PBS had won 25 seats plus 1 seat from Pasok?

A. As far as I remember, I was not informed of this by anyone.

Q. Perhaps earlier, at your office, you had been told of this by Tan Sri Hamid Egoh and Nicholas Fung.

A. Probably, but I could not remember.

Q. Did not Nicholas Fung tell you that PBS had 25 seats and you should not appoint Tun Mustapha, but Datuk Pairin.

A. I was not advised by Datuk Nicholas Fung as such. He only told me that if I appoint Tun Mustapha, it would be unconstitutional. That is what I remember.

Q. The whole basis of the discussion in the Private Secretary's office was: PBS 25 seats and USNO and Berjaya 22 seats.

A. As far as I can remember, PBS was not mentioned at the time; only USNO and Berjaya were mentioned.

Q. What do you think Datuk Nicholas Fung was talking about?

A. As far as I can remember, he was telling Datuk Yahya Lampong and Majid Khan that USNO and Berjaya together did not get the majority.

Q. Were you told by Nicholas Fung and Hamid Egoh that there was a final result showing PBS with a majority?

A. As far as I can remember, I was not told.

Q. You were told by Hamid Egoh and Nicholas Fung: PBS 25 seats and USNO and Berjaya 22 seats.

A. As far as I remember, I was not told as such. When the argument arose then only the seats won by USNO and Berjaya were mentioned frequently.

Q. You did not have to wait until 6 o'clock to know the final results. You had been told.

A. As I stated, from my view, the results of the election were not totally known because the results of 2 seats were not known. Probably they knew, but I did not know. When the argument arose about the appointment of Tun Mustapha then the information came out that USNO and Berjaya had 22 seats: 16 and 6. I did not know how many seats PBS had won. That was

what they said, but at that time I did not know about the results of 2 seats which had not been published. Probably they had published it, but I was not aware. I relied on Tan Sri Hamid Egoh for election results. Normally if the situation is different and there is no trouble I only rely on him for election results."

It is to be borne in mind that USNO, Berjaya and PBS were not the only parties fielding candidates; further, that there were independent candidates as well.

"*Q.* You did not have any intention to wait until 6 o'clock to hear the election results, did you?
A. I intended to wait until morning."

Article 6(3) of the Constitution requires D.W.1 as the Head of State to appoint as Chief Minister –

(a) a member of the Legislative Assembly;
(b) who in his judgment is likely to command the confidence of the Assembly.

It is common ground that the State of Sabah operates under a party system of government, and the general election concerned here was held under the same system. The Head of State therefore cannot constitutionally exercise or make his judgment on the appointment of a Chief Minister without taking into account the number of elected seats secured by each and every political party and, for that matter, by the independent candidates, in the election. It is clear that, if he omits to take into account the number of seats obtained by any particular political party which participated in the election, it cannot be said that he had exercised or made his judgment under Article 6(3), for, if he did so, he would be acting unlawfully and unconstitutionally by ignoring or not complying with the requirement, in particular of Article 6(3). In such circumstances, it is equally clear, in my view, that he has made no judgment under Article 6(3). In this connection, I see no difference between this situation and the case where the Head of State appoints as Chief Minister a person who is not a member of the Legislative Asembly, contrary to the express requirement of Article 6(3).

I am proceeding on the assumption that the swearing in of a Chief Minister, without an instrument of appointment, would be sufficient to constitute an appointment under Article 3. I shall later deal with the question of law as to whether an instrument of appointment is legally necessary.

Here, I have found as a fact on the evidence as accepted by me and for the reasons given, that, in swearing in plaintiff, D.W.1 as Head of State had not taken into account the number of seats secured by PBS, particularly since he was still waiting for the official results to be announced when he swore in plaintiff. Even if it can be said that, at some stage before the swearing in, the number of seats secured by PBS were made known to him, the evidence indicates that this left no impression on his mind so as to cause him to take this factor into consideration when he decided to swear in plaintiff. On the contrary, I find that the evidence points to the other way. Accordingly, since in my view this is contrary to one of the requirements of Article 6(3), albeit not an express one, by swearing in plaintiff as Chief Minister, D.W.1 had not made a judgment within the ambit of Article 6(3), and the swearing in has no legal effect. Clearly, as I find to be the case here, on the evidence as accepted by me, Article 6(3) does not permit D.W.1 to swear in plaintiff, just by taking into account the combined number of seats obtained by USNO and Berjaya, with or without the nominated members, without taking into consideration the number of seats secured by PBS, even on the basis of a coalition between USNO and Berjaya, as to which, in view of my rejection of the alleged conversation of D.W.1 with Datuk Harris, and my findings on the evidence of P.W.1, P.W.3 and P.W.4, the position is by no means clear on the evidence.

For the reasons given therefore, I find that the swearing in of plaintiff by 1st defendant is null and void and has no legal effect on this ground.

In my view, if the basis is to be laid under the subject of "Reviewability", this would come under the principle of illegality which is not contended by LCP to be not open to the Court to consider.

In reaching this conclusion on this ground, and on the second ground, I have borne in mind the submission of no case to answer made by LCP and the burden of proof on the defendants. This applies to all my other conclusions in this judgment.

As to the second ground for my conclusion that 1st defendant did not make or exercise a judgment under Article 6(3) of the Constitution, because the swearing in of plaintiff was made solely as a result, cumulatively, of the pressure and threat contained in the words in the "paper" as understood by 1st defendant, operating on his mind, and when he was frightened and confused in mind and tired physically, and when he was unable to think properly, it would be a remarkable and dangerous situation were I to accept the view that,

in such circumstances, the swearing in of plaintiff is legal, constitutional and valid. If such be the legal position, the same will have to be the position, if, for instance (this is an illustration only, with no disrespect meant to His Majesty or anyone else), an elected leader of a party who claims to be qualified to be the Prime Minister after a general election, adopts the same methods of persuasion on His Majesty the Yang di-Pertuan Agong, and as a result of such persuasion, His Majesty appoints him to be the Prime Minister. Such a situation would be so ridiculous that it hardly needs any elaboration. It is true that there are no nominated seats in the Dewan Ra'ayat; but the situation may apply where, for instance, there is a tie; and there are only two political parties. I would reiterate that I am not here dealing with the situation where there was a judgment made under the Constitution, and the propriety of the judgment is being questioned, as in the Indian case referred to.

I do not consider that the Constitution envisages or permits that the judgment of the Head of State under Article 6(3) could be made in circumstances which I have found to have occurred here, when the swearing in was not made voluntarily and willingly, but was done under pressure, threat, fright and when the mental and physical condition of the Head of State was such that he could not think properly. In my view, the Constitution envisages that the Head of State should be allowed to make his judgment quietly, freely, independently and impartially, without any influence, pressure, threat or other factors not sought by him which might influence his judgment. In my view, this is not only what the Constitution envisages and requires. It is common knowledge that it is the tradition in all countries having the party system of government based on Parliamentary democracy, and the Constitutions of which follow the Westminster model, that this should be so.

Hence, I find that, in swearing in plaintiff under the circumstances as found by me, 1st defendant has made no judgment under Article 6(3) of the Constitution. Accordingly, such swearing in is null, void and of no legal effect.

If I am wrong in my conclusion above, the next point to consider is whether, on the assumption that the taking of the oath is sufficient to constitute an appointment, this is vitiated by duress, as pleaded by the defence. On this issue, it was submitted by LCP that, on the pleadings, defendants must either prove the pleaded case of threats to life beyond reasonable doubt, or fail. Further, that the matter of duress is imported into public law from private law and criminal law, and does not slip into one of the existing categories of "judicial review", and that therefore it should be understood in the criminal law sense, or, by analogy as defined in the Contracts Act, 1950. On the basis of analogy, sections 14-15 of the 1950 Act define "free consent" and "coercion" respectively. No judicial authority has been cited to show that in this instance, duress should be understood in the criminal law sense or in the sense as defined in the expression "coercion" in the 1950 Act, considered together with section 14 thereof. On the other hand, LCD has contended that the defence does not involve consideration of duress in the criminal law sense, since the defence has made no allegation that a crime has been committed by plaintiff or his agents or supporters; or in the contractual sense, since this is not a case in which 1st defendant is seeking to set aside an alleged contract made with plaintiff to appoint the later as Chief Minister. It was submitted that this is a case in which plaintiff is seeking to enforce his alleged right to be Chief Minister upon the basis of a decision made by 1st defendant. In this connection, I am inclined to accept the contention of LCD. However, following from this, it was in effect submitted by LCD, if I understood him correctly, that this would involve consideration of the validity of such a decision and, under public law, this would further, in effect, involve consideration of reviewability of the Head of State's decision by looking into his mind. On this basis, I am of the view that the Indian cases cited by LCP and the *State of Rajasthan's* case (*supra*) which are constitutional cases, involving construction of the Indian Constitution, clearly establish that if a decision has been made under the relevant constitutional provisions, the propriety of such a decision is not open to the Courts to review. However, it is clearly established by the *State of Rajasthan's* case, among others, that it is the function of the Court to examine the evidence and decide whether any constitutional provision has been breached, or whether a decision falls within any particular constitutional provision, for otherwise it is no decision. At this stage, I would state that, having listened to and read the respective submissions of LCP and LCD on the subject of reviewability, I am of the view that the Indian constitutional cases referred to are relevant, as distinct from the English cases cited which are concerned with the public law principles regarding review of administrative and executive decisions, whether based on the exercise of a prerogative

power or not, in contradistinction with decisions made under a written constitution. I am therefore unable to accept the contention that, in considering whether a decision of the Head of State made under Article 6(3) of the Constitution was valid, this would open the door to examining such a decision by applying the public law principles of rationality and procedural propriety (*Council of Civil Service Unions* v. *Minister for Civil Service*[2]) for, in my opinion, to do so would run counter to the principles mentioned earlier relating to matters which the Court can examine under a written constitution, and those which are not subject to review by the Court. I am further of the view that the power conferred on the Head of State under Article 6(3) of the Constitution is a constitutional one, as distinct from a prerogative power, as such. The matter of "illegality" is different. LCP recognised, quite rightly in my view, that a decision which involves a breach of or non-compliance with Article 6(3) of the Constitution may be regard as an illegal decision. I had already dealt with the matter earlier and need say no more here.

If the duress pleaded in the defence should not, in the circumstances, be considered in the criminal law sense, or in the sense as recognised by the law of contract, or in the "reviewability" sense referred to above, as is my view, then in what sense, should it be understood? In this regard, I am not aware of any judicial authority on the point. In considering the matter, I am guided by the dictionary definition of the word "duress", and common law principles. I see no reason, in the circumstances, as at present advised, for not applying them. The relevant meaning given to the word "duress" in the *Oxford English Dictionary* is as follows:

"4. Constraint, compulsion; spec. in Law, Constraint illegally exercised to force a person to perform some act. Such compulson may be by actual imprisonment, by threat of imprisonment or of loss of life or limb, or by physical violence. A deed or contract made under duress is voidable on a plea of duress at a subsequent trial ..... *Blackstone* Commentaries I, i 131. The constraint a man is under in these circumstances is called in law duress, from the Latin durities, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty ..... and duress *per minas*, where the hardship is only threatened and impending."

The relevant part of the definition of "Duress" in *Jowitt's* Dictionary of English Law, Vol. I, 2nd Edition, is as follows:

"..... imprisonment, compulsion. Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in the strict sense), or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress *per minas*) ....."

I do not derive assistance from judicial authorities on the concept of duress, as applied to the law of contract, including those bearing on the matter of economic duress (see for instance, *Universe Tankships Incorporated of Monrovia* v. *I.T.F.*[3]) nor from prominent legal publications such as *Goff & Jones's* "Law of Restitution", as they deal with the question of duress, in relation to other matters. The test of duress to avoid a contract of marriage in matrimonial law would appear to be less stringent: see *Hussein* v. *Hussein.*[4]

Applying, as I do, the principles contained in the definitions set out by me earlier, I find that the evidence is not sufficient to constitute unlawful constraint, or compulsion by imprisonment or threat of imprisonment, or of loss of life or limb, or of physical violence, as in the *Oxford English Dictionary* definition, committed or held out by plaintiff or his agents against 1st defendant, or that what was done by plaintiff or his agents falls within any of the definitions of "Duress" contained in *Jowitt's* Dictionary of English Law. Accordingly, I find on the evidence that defendants have not succeeded in proving the defence of duress, as pleaded against plaintiff.

I appreciate that the matter is not free from difficulty, as is evident from the respective submissions of LCP and LCD, and an authoritative pronouncement from the highest judicial forum in the land would be most welcome.

III *Circumstances under which 2nd defendant was allegedly appointed as Chief Minister; and whether the alleged appointment is legal and valid.*

I have found that plaintiff entered the Istana, unauthorized by 1st defendant; and that before such entry, 1st defendant had not decided to appoint plaintiff as Chief Minister. I have also found that the swearing in of plaintiff by 1st defendant is null and void and of no legal effect.

The events which followed the swearing in should now be considered in order to see whether they affect my above findings and whether the subsequent appointment of 2nd defendant by 1st defendant is legal and valid. But before that, I would deal with two matters which occurred before the swearing in:

(1) *D.W.8's evidence on his telephone conversation arising from Datuk Herman Luping's visit.*

D.W.8's evidence was that he telephoned Extension 126 at the Istana, which it is common ground is that in the office of P.W.1, at the request of Datuk Luping. He telephoned three times. On the first occasion, Corporal Sunoh answered the telephone and said to D.W.8, with reference to Datuk Luping:

"Don't let him in. They are having a meeting now, and there is no decision yet."

On the second occasion, when he telephoned the same extension 126, the same Corporal said to him, with reference to Datuk Luping:

"Don't let him in. He is a dangerous man."

On the third occasion, when D.W.8 informed Corporal Sunoh that (as D.W.8 was informed by Datuk Luping) 2nd defendant had arrived at the gate, Corporal Sunoh replied through extension 126:

"Don't let him in. Do you know or not, that Datuk Pairin is the most dangerous man."

LCD has submitted that these conversations show that, upon the instruction of P.W.1, Corporal Sunoh was concerned with preventing Datuk Luping or 2nd defendant from entering the Istana at the time these conversations took place; and further, that the first reply by Corporal Sunoh indicates that the decision mentioned was referrable to the decision whether or not to swear in plaintiff. On the other hand, LCP submitted that the very nature of what was stated as being the answers of Corporal Sunoh shows that they are incapable of being said or believed, as was the suggestion that the replies were made on the instructions of P.W.1. In this respect, I have found on the evidence of D.W.8, that he did telephone extension 126, as distinct from extension 124 in the bodyguard's room, as alleged by P.W.1. The telephone conversations are, of course, hearsay, since Corporal Sunoh has not been called. On this basis, I make no finding as to the truth of these telephone conversations, but I do find that they have been made, as testified by D.W.8, despite the evidence of P.W.1 that at the material times Sunoh was in the hall, which I do not believe. I further find that the answers were made by Corporal Sunoh, and it is clear from them that they were intended to prevent Datuk Luping and 2nd defendant from entering the Istana at the time that they were made. I also find that there is insufficient evidence to indicate that the kind of answers given by Corporal Sunoh resulted from instructions given to him by P.W.1.

(2) *Video recording of swearing in of plaintiff (Ex. P55).*

It is common ground that this video recording was made by the husband of a supporter of plaintiff. Having watched the recording and taken into account the submissions of LCD, I do not find that, by itself, this exhibit, and the evidence given in connection with it, is sufficient evidence indicating that the swearing in of plaintiff by 1st defendant was made under threat or pressure. As to P.W.1, as shown in that exhibit, I do not consider that the various positions he took during the swearing-in ceremony constitute sufficient evidence that he was reluctant or attempted to avoid, to have himself shown in the video recording by the cameraman.

I now proceed to consider the events after the swearing in of plaintiff, under separate headings.

Events at Istana up to departure of plaintiff from Istana

The evidence clearly established that after the swearing-in ceremony of plaintiff, 1st defendant straightaway went upstairs, without congratulating plaintiff or providing refreshments for those taking part in or witnessing the ceremony, or saying goodbye to plaintiff. This is certainly contrary to the normal position, which is common knowledge, that all these take place after the swearing in of a Chief Minister. In my view, this is evidence to support the conclusion that 1st defendant did not voluntarily and willingly swear in plaintiff.

It is common ground that the swearing in took place at about 5.30 a.m.; and that plaintiff did not leave the Istana until about 7.00 a.m. or shortly thereafter. The evidence does not show what he was doing at the Istana between these times.

There is clear evidence that he was escorted home by police outriders and the Istana bodyguards, close escorts and their cars. I have found that the bodyguards and close escorts could not have acted on their own without instructions, and that such instructions came from P.W.1. I do not believe his evidence that he was unaware of the presence of plaintiff at the Istana after the swear-

ing in, and his suggestion about the possibility of any such instructions having emanated from the Private Secretary. It is common ground that the instruction was not given by 1st defendant. It is also in evidence that Istana bodyguards and close escorts are solely providing protection and escort to 1st defendant and his family. My finding on the matter is not inconsistent with the conclusion that the entry of plaintiff was effected with the assistance of P.W.1. There is an obvious attempt to make it believed that plaintiff left the Istana earlier, as shown in the alteration to entry 1165 in the bodyguard diary (Ex. P60) although it is not known who actually did the alteration as to time of that entry.

Superintendent Victor Lim's (D.W.11) evidence and bodyguard diary (Ex. P60).

D.W.11 is a most impressive witness. He gave his evidence in a clear, firm and straightforward manner. I found him to be an impartial, independent and honest witness, whose evidence I have no hesitation in believing and accepting. He stood up very well in cross-examination and was entirely unshaken. I can well understand his dismay when, at some stage of his cross-examination, it was suggested or implied that he might not be an impartial witness. Where his evidence conflicts with that of P.W.1, I accept his evidence in preference to that of the latter, subject to what I will consider later about the entries made by P.W.1 in Ex. P60 concerning appointments made with 1st defendant for 2nd defendant to see him.

D.W.11 entered the Istana building at around 6.00 a.m. on April 22, 1985. It is common ground that he then met P.W.1. They gave different versions of the conversation between them thereafter. D.W.11 stated that he told P.W.1 that Datuk Herman Luping was outside the gate with a few friends, and that they were hoping to see 1st defendant with a view to making an appointment for 2nd defendant to see 1st defendant, and he asked P.W.1 whether the latter could deliver the message to 1st defendant; and P.W.1 replied: "Saya tidak berani. Saya tidak lama mahu pencen. Saya tidak mahu campur ini hal." On the other hand, P.W.1 said that D.W.11 told him: "I was directed by Datuk Commissioner of Police to deliver a message to the TYT. Can you deliver the message?" P.W.1 answered: "It is better for you yourself to deliver the message." It was submitted on behalf of plaintiff that the version given by P.W.1 should be accepted in preference to that of D.W.11, particularly since P.W.1 could not have mentioned the Commissioner of Police unless D.W.11 had mentioned it. In this regard, the entry by P.W.1 under entry 1161 in Exhibit P60 is similar to the evidence of P.W.1. That this should be so is obvious, since the entry was made by P.W.1. But this is no corroboration of his evidence, since he cannot corroborate himself. I have stated that, where their respective evidence conflicts, I prefer D.W.11's evidence to that of P.W.1, and no less so on this part of his evidence. It is true that D.W.11 did not mention the Commissioner of Police in his evidence, but his earlier evidence was to the effect that he delivered Datuk Luping's message on instructions from the Commissioner of Police. I find that this omission does not affect his credibility as a witness in the circumstances.

P.W.1 testified that he made the entries 1161, mentioned above, and 1162, 1163 on the instructions of D.W.1. The latter 2 entries relate to the same visit of D.W.11 to the Istana. The matters mentioned therein have not been put to D.W.11 in cross-examination, and I do not consider that they affect his credibility as a witness. Entries 1168 and 1169 respectively record, *inter alia,* that 1st defendant did not want to see Datuk Herman Luping until he gave permission later; and the agreement of 1st defendant to see 2nd defendant alone at 2.30 p.m.; and P.W.1 informing D.W.11 of these matters. The evidence of D.W.11 was that, while he was at Police Headquarters, he received 2 telephone calls from P.W.1. The first call informed him that 1st defendant would only see 2nd defendant at 2.30 p.m.; and the second, which came about half-an-hour later, that 1st defendant was not going to see anybody at 2.30 p.m. It was submitted on behalf of plaintiff that the evidence of P.W.1 is more correct and should be accepted, as the evidence of P.W.1 shows that it was as a result of the suggestion made by D.W.7 through the Private Secretary to D.W.1 that 1st defendant agreed to see 2nd defendant at 2.30 p.m. eventually. As to this, it is to be observed that, whereas Entry 1168 mentions the name of Datuk Luping as the person whom 1st defendant did not want to see, this name did not appear in the evidence of D.W.11. In his earlier evidence, he never mentioned about an appointment being made for Datuk Luping, but stated it was for 2nd defendant to see 1st defendant. Further, the same entry did not mention any time, but the evidence of D.W.11 gave the time as 2.30 p.m. In any event, D.W.11 was not cross-examined on these entries, and I do not consider that, even if he was wrong in the sequence of the two telephone calls, this affects his credibility as a witness. Further, because of the differences be-

tween Entry 1168 and the evidence of D.W.11, I am not prepared to find that that entry and Entry 1169 truly record all that were stated in them, without cross-examination of D.W.11 on them. Entry 1167 records the visit of Datuk Harris to 1st defendant, and such visit was stated as having occurred at 11.30 a.m. P.W.1 admitted that the figure "10" in "10.30" has been altered to "11", but gave the altered time as the correct time the visit took place. D.W.1 gave the visit as having occurred at about 11.00 a.m. P.W.1 also testified that his impression was that this visit of Datuk Harris was a farewell visit, and there is no evidence to show otherwise. As to the two gentlemen who were alleged to have accompanied Datuk Harris on this visit, which was not admitted by D.W.1, I find that there is no satisfactory evidence to establish this. The Entry 1167 pertaining to this visit made no mention of them; and I am not inclined to believe P.W.1 when he stated that this was because he shortened the entry. If Entry 1167 is relied on as indicating that this visit of Datuk Harris has something to do with the change of mind of 1st defendant to see anyone from PBS, including 2nd defendant, after agreeing to do so, I find on the evidence that it has failed to achieve this object.

Entry 1172 relates to the temporary postponement of the swearing in of the USNO/Berjaya Cabinet. On the evidence, I do not find that 1st defendant knew about this swearing in. The evidence shows that it was probably a matter arranged with the Private Secretary through the Personal Assistant to Datuk Harris, Puan Zubaidah. To my mind, this is another indication of the part played by Datuk Harris in connection with the entry of plaintiff into the Istana, taken with the other evidence, including that of D.W.2 and D.W.7.

I am satisfied on the evidence that the arrangement regarding escort of 2nd defendant to the Istana, his short presence at the subsequent meeting between 1st and 2nd defendants, and his presence at the swearing in of 2nd defendant, were strictly and properly in the performance of his police duties; and his attendance at the press conference of 2nd defendant was also proper. Further, it is not challenged that the arrangement made by him for the swearing in of 2nd defendant to be videotaped was on the instruction of 2nd defendant.

There is one aspect of the evidence of D.W.11 which requires mention. He testified that when he saw 1st defendant at the Istana on the morning of April 22, 1985, the latter told him: "You know I swore in Tun Mustapha as the Chief Minister", to which D.W.11 replied in the affirmative, having been previously informed of this by P.W.1. The 1st defendant said: "I had to do it, you know." 1st defendant had no recollection of this conversation. I accept the evidence of D.W.11 on the matter. The failure to recollect this conversation was relied on by plaintiff as an illustration of the unreliability of the evidence of 1st defendant. With respect, I do not find this to be so in the circumstances. I find that this is probably a lapse of memory on the part of 1st defendant, having regard to his mental and physical condition then. He told D.W.11: "... I have not had sleep the whole night." Further, why should he deliberately withhold evidence which is apparently favourable to his case? I find that the cross-examination of D.W.11 has no effect on his credibility as a witness.

It was submitted on behalf of plaintiff that the following events constitute pressure on 1st defendant, causing him to change his mind and appoint 2nd defendant, after having appointed plaintiff regularly and properly. I find that singly, or cumulatively, on the evidence as accepted by me, that any or all, such events did not constitute pressure on 1st defendant, and cause him to appoint 2nd defendant, for the reasons to be given when I deal with each of these events listed in the submission, which I now do.

(1) *Unwillingness to see 2nd defendant.*

It was pointed out that 1st defendant had changed his mind during the morning as to whether he would see 2nd defendant at all, and if so, whether with others, or alone; and that his decision to see 2nd defendant was unexplained. I have partly dealt with this matter earlier in considering the bodyguard diary (Ex. P60). As to what is pointed out above, having regard in particular to the mental and physical condition of 1st defendant in the morning, and the evidence of D.W.11 about the advice that, before the 2.30 p.m. appointment was kept, confirmation should first be sought from 1st defendant. I do not consider it probable that the change of mind of 1st defendant to be attributable to his unwillingness to see 2nd defendant, or anyone else from PBS. It will be recalled that he had said to D.W.11: "You know, I would like to see them, but I have not had sleep the whole night." Further, I have held that it has not been shown that the morning visit of Datuk Harris is any contributory factor to the change of mind of 1st defendant. On the evidence, I find it to be more

probable that it was due to his mental and physical condition and need for rest.

(2) *Civil unrest.*

Two matters were mentioned.

(i) People gathering at Menggatal and Inanam between 12.00 noon and 1.00 p.m.

It was submitted that this was obviously a PBS march, and the evidence of D.W.7 shows this to be so, as he said that "Perhaps they were not happy with the appointment of Tun Mustapha ..... I suppose pressure was building up in K.K., because they, PBS, were not happy." However, D.W.7 also stated: "But I cannot say, as I was not there." It is said that 1st defendant must have known about this march, but there is no evidence that this is the case. There is no evidence to draw any such inference.

(ii) PBS supporters demanding to know at Sri Gaya road junction road block whether 2nd defendant was safe during his meeting with 1st defendant at Istana, to such an extent that 2nd defendant had to go personally to pacify them. On this matter, the main evidence is that of D.W.11. There is also the evidence of 2nd defendant. D.W.11's evidence, in my view, does not give any impression that the 3 occasions mentioned by him constitute any form of pressure on 1st defendant: they probably indicate anxiety, but not pressure.

(3) *Dato Musa's broadcast.*

It was pointed out that 1st defendant claimed not to have heard of Dato Musa's broadcast, but considered it of sufficient importance at 3.00 p.m. to show D.W.7 the note he had received above it. It was submitted that it should be inferred that whoever gave him the note expanded on the broadcast. In this connection, there is no evidence for any such inference to be drawn. On the contrary, 1st defendant, on being questioned about this, gave a categoric answer in the negative.

It was submitted that even the note, with no further details, constitutes a clear statement that the Federal Government has accepted that PBS should have formed the Government in Sabah; and that there is implied a most serious criticism of 1st defendant's appointment of plaintiff. On his being cross-examined on this matter, 1st defendant's evidence was that after he had read the note, he straightaway handed it to D.W.7; he did not understand its intention; and he stated that D.W.7 would probably know this. He further said that he did not regard it as anything he should be concerned with; and he could not care less. Considered in the light of my finding that 1st defendant did not invite or give permission for the entry of plaintiff to the Istana; and that he did not intend to appoint plaintiff as Chief Minister, this evidence constitutes reasonable and, in my view, not untrue, answers to the questions put to him. On the assumption that he had intentionally appointed plaintiff, I have no reason to doubt the truth of his evidence as well, considered in the light of the rest of the evidence.

I do not therefore find that Dato Musa's broadcast constitutes any form of pressure on 1st defendant to change his mind and appoint 2nd defendant.

(4) *Legal threats.*

The form of the letter Ex. D7 written by 2nd defendant dated April 22, 1985 as altered, should be considered. It is to be observed from the contents of the letter, that it was written on the assumption that, despite persuasion made by 2nd defendant, 1st defendant had decided to affirm his "unconstitutional" decision to appoint plaintiff as Chief Minister.

It was pointed out that the timing of the delivery of the letter is mysterious; that D.W.2 saw a copy of it on 1st defendant's desk, but 2nd defendant (D.W.10) stated that he did not bring a photocopy. It was further pointed out that D.W.10 stated that there was a photocopying machine at the Istana. It was submitted that the probability is that the letter Ex. D7 came earlier and was photocopied at the Istana. From this, it follows of course that 1st defendant would have read and considered Ex. D7 before 2nd defendant came to the Istana. However, I consider that the evidence does not justify this conclusion. First, as mentioned earlier, para. 4 of Ex. D7 was written on the basis that, after persuasion by 2nd defendant, 1st defendant had decided to affirm his "unconstitutional" decision to appoint plaintiff as Chief Minister, which 2nd defendant could not have done before he met 1st defendant. Second, 2nd defendant testified that it was not possible for Ex. D7 to have been sent earlier, so that 1st defendant could have had it photocopied. D.W.1's evidence does not indicate that he had read the letter before the arrival of 2nd defendant. On the evidence, I find that it is probable that 2nd defendant brought Ex. D7 with him when he saw 1st defendant, although

the former had no recollection of it, but concluded that he must have done so. It was suggested that one letter from 2nd defendant to 1st defendant was mentioned but not produced in evidence, and Ex. D7 could have been that letter. I consider that there is no evidence to draw that inference.

It was submitted that the letter constituted a legal threat and it was said that this was agreed by D.W.2. However, both D.W.2 and D.W.7 testified that when they saw 1st defendant shortly after the arrival of 2nd defendant, they had the impression that 1st defendant had decided to appoint 2nd defendant as Chief Minister. D.W.2 stated in evidence:

"At that time, when we sat down, from what I could see, it was quite clear that Tun Adnan wanted to appoint Datuk Pairin."

In his evidence, D.W.7 said:

"Up to 6.00 p.m. and 6.30 p.m. it was still time for TYT to change his mind about swearing in Datuk Pairin. But he had already made up his mind the moment we came in."

Other than Ex. D7, it has not been suggested that any pressure or threat regarding his appointment came from 2nd defendant personally. The evidence of 1st defendant on Ex. D7 is that he could not care less about the threat of legal action, and that Ex. D7 did not have any effect on him, because he had made his decision to appoint 2nd defendant at an earlier stage. Further, in relation to his meeting with 1st defendant, 2nd defendant said in evidence:

"When I entered his office, the Head of State was already there, waiting for me. We greeted each other as friends, warmly and cordially. Then we both sat down. Then I started to speak to him, when he stated that 'I would have called you earlier, but I thought I had better not' or something to that effect."

To my mind, that does not indicate any reluctance on the part of 1st defendant to fix an appointment to see 2nd defendant; or that it was only through pressure, legal or otherwise, that 1st defendant decided to see and appoint 2nd defendant as Chief Minister.

P.W.1 testified that two documents from PBS were delivered to 1st defendant: one, a letter at about 9.00 a.m.; and the other, a telegram, at about 12.30 p.m. The first document appears to be the one mentioned in the evidence of 2nd defendant, and he stated that it requested an audience with 1st defendant. P.W.1 stated that when D.W.1 opened the letter, he said: "These PBS people wanted to see me. I do not want to see them until 2.30 p.m." This does not contradict the evidence of 2nd defendant. As to the second letter, it was pointed out that in his opening submissions, LCD has stated that it was sent by 2nd defendant, protesting that the appointment of plaintiff was improper. However, this does not appear in the evidence of 2nd defendant. P.W.1 stated that, after reading the telegram, 1st defendant said: "People from Parti PBS want to see me. I do not want to see them." This is my view does not constitute pressure, but suggests that the telegram sought to have an audience with 1st defendant. Both the letter and telegram mentioned are not in evidence.

It was suggested that a letter was sent to 1st defendant by the firm of Datuk Herman Luping demanding that 2nd defendant be appointed as Chief Minister, otherwise legal proceedings would be commenced. 1st defendant denied ever having received such a letter. 2nd defendant stated he gave no instructions for such a letter to be sent. On the evidence as accepted by me, I find that there is no such letter. However, in connection with this alleged letter, the suggestion was pursued with in the cross-examination of D.W.1, as the following questions and answers show, relating to the visit of Datuk Harris, after 1st defendant stated he spoke to Datuk Harris in Bahasa Malaysia:

"*Q.* Did you say: 'All have been settled last night?'
A. No.
Q. Or some similar words?
A. No."

Then 1st defendant stated that he did not show any letter to Datuk Harris; and that no letter from Datuk Herman Luping was shown to the latter. This is another instance of making an allegation against 1st defendant without the person, on whose instructions no doubt the allegations were made, giving evidence to substantiate them. In the circumstances, I would here again apply the presumption under section 114(g) of the Evidence Act, 1950 against plaintiff.

(5) *Before letter to plaintiff.*

It was submitted that before the letter of revocation to plaintiff, 1st defendant had kept silent and taken no steps relating to the appointment of plaintiff, and these indicate that no doubt was cast by 1st defendant on the validity of the appointment of plaintiff, when, if 1st defendant had considered the position to be otherwise, he would have done so.

As to this, it is to be noted that the mental and physical condition of 1st defendant after the swearing in of plaintiff was described by him thus:

"After everyone went home, I was tired and sleepy; and I could not think straight at the time. I did not get any sleep."

The following questions and answers appear in his cross-examination:

"*Q.* Up to 2 to 2.30 p.m., you took no steps at all to reverse the position of Tun Mustapha as Chief Minister.
A. Yes, I did not act as yet, but it was already in my mind as to what I was going to do.
Q. In fact, it was not on your mind until pressure was put on you by Datuk Pairin.
A. No."

The evidence of D.W.2, D.W.7 and 2nd defendant shows that, far from considering that the swearing in of plaintiff was validly made by 1st defendant, the converse is the likely position. In any event, I accept the evidence of 1st defendant as quoted above. Hence, I find on the evidence as accepted by me that, any failure or omission by 1st defendant in the manner suggested does not indicate that he regarded that he had validly and properly sworn in plaintiff.

I shall deal with the legal aspects of the letter of revocation to plaintiff later.

Taking all the relevant evidence into consideration, in the light of the rest of the evidence, I find that the appointment of 2nd defendant by 1st defendant was made willingly, voluntarily and freely, without any influence, pressure or threat of any kind from anyone, including the matters submitted and dealt with above, including those submitted to have constituted pressure. Further, that such appointment is legal and valid.

Letter of revocation

The evidence accepted by me shows that this letter was drafted by D.W.2, translated into Bahasa Malaysia, and eventually delivered by the Private Secretary Sukarti to plaintiff. P.W.1 stated that it was Jalil who did so, but I prefer the evidence of D.W.2 to his on this. 1st defendant suggested the use of the word "revoke" in preference to "dismiss", to D.W.2, but I do not consider that much turns on this from the evidence. I find that this letter (Folio 2 of Agreed Bundle of Documents) was in fact delivered to plaintiff, and that there was no response from him. However, D.W.2 has testified that plaintiff was not really given a chance to resign. I find that when D.W.2 drafted the letter, he did so under the impression that 1st defendant had appointed plaintiff as Chief Minister. I also find that he did not seek confirmation from 1st defendant, and nor was he told by the latter, that that was in fact so; having been earlier informed by Sukarti that there was a swearing in of plaintiff.

As to the legal effect of the letter of revocation, I agree, with respect, with the decision and the reasons therefor given in the case of *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli.*[5] I find that termination of any legal appointment of a Chief Minister in this manner is not valid; and that any chance to resign given to a legally appointed Chief Minister should be in accordance with Article 7(1) of the Constitution, after a vote of no confidence given against him in the Legislative Assembly.

The Oath

I accept the evidence of D.W.7 on this. His evidence was to the effect that, as far as the procedural steps were concerned, there was nothing irregular about it.

Was there a conspiracy?

The defence submitted that the conspiracy pleaded was to effect plaintiff's entry, uninvited, into the Istana, and to persuade 1st defendant to misuse his constitutional powers by using the power of nomination to inflate plaintiff's political support so as to appoint him contrary to the requirements of the Constitution. It was pointed out that the conspiracy alleged does not mean a criminal conspiracy; but was referrable to an agreement or a series of agreements to achieve these ends.

Much reliance was placed on the "*Asiaweek*" article (Ex. D36) by the defence. I had earlier briefly dealt with it in connection with another topic. As stated, it was contended by LCP that the accuracy of that article is open to grave doubts, particularly having regard to the apparent mistakes and inaccuracies as to times and the happening and sequence of events mentioned therein. In this connection, two matters may be mentioned: those relating to time of swearing in and the nominated members respectively. I have found, on the evidence of Assif Shameen (D.W.3), that he had accurately reported in the last paragraph of that

article, what plaintiff had told him during the interview he had with plaintiff. Plaintiff was given opportunity to rebut the accuracy of that article, but he had chosen not to do so. I find, weighing that paragraph with the rest of the evidence, and taking into account that its accuracy has not been tested by plaintiff, that, although it may be inaccurate on times, and happening and sequence of certain events, it is accurate as to the essential details on relevant matters given by it. That article, considered in the manner I have indicated, shows that plaintiff entered the Istana with full knowledge and approval that there was to be an USNO-Berjaya coalition; that the six nominated seats would be used to inflate the seats of the coalition. On the other hand, that paragraph also indicates that plaintiff was led to believe by Datuks Yahya Lampong, Majid Khan and plaintiff's son Datuk Abdul Hamid Mustapha, that the USNO-Berjaya coalition had the blessing of the Acting Prime Minister, Dato Musa, and that Dato Musa wanted him to take the oath; and that the Head of State was waiting. It is inconceivable that the USNO-Berjaya coalition would have been effected without the agreement of plaintiff; as is the case of the use of the 6 nominated seats for the purpose mentioned. That paragraph also indicates that, being conscious of the principle of majority rule, plaintiff nevertheless agreed to use the 6 nominated seats to inflate the seats of the coalition in order to secure a majority, and this would be contrary to what would appear to be his belief that the elected majority should form the government. That article also indicates the active participation of Datuk Harris, as President of Berjaya, Datuk Yahya Lampong as agent of plaintiff, Datuk Majid Khan, and the son of plaintiff, Datuk Abdul Hamid Mustapha, in the formation of the coalition. With the state of knowledge of these persons, as well as that of plaintiff, regarding the state of the parties when they started on the journey to the Istana, the evidence shows that they entered the Istana with only one object, and that is to have the coalition government formed by having plaintiff sworn in as Chief Minister. Subsequent events indicate quite clearly that use indeed had been made of the six nominated seats to inflate the coalition seats. On this, I find on the evidence that 1st defendant had no prior knowledge of the use of these nominated seats, until the matter featured prominently during the arguments in the Private Secretary's room.

I find that the evidence shows that Datuk Harris was a prime mover in securing the successful formation of the USNO-Berjaya government. I have rejected the alleged telephone conversation between 1st defendant and Datuk Harris before the plaintiff's arrival, and that between them regarding Dato Musa's broadcast. I have also rejected the alleged conversation made between 1st defendant and Dr. Ya'acob Merican which indicates that 1st defendant, having appointed plaintiff, sought his legal advice about Ex. D7. The evidence clearly shows that it was Puan Zubaidah, Datuk Harris' Personal Assistant, who telephoned P.W.1 at about 2.15 a.m. that he wanted to see 1st defendant, but he never came before the arrival of plaintiff. The evidence indicates that it was Datuk Harris who gave the information about the coalition and swearing in of plaintiff to D.W.2 and D.W.7, and his instructing them to go to the Istana, most probably to witness the swearing in. The evidence of P.W.1 also shows that his Personal Assistant it was who communicated with the Private Secretary about the swearing in of the coalition Cabinet, and in this connection, there is no evidence that 1st defendant knew anything about this; nor has it been put to him in cross-examination. Further, it was Datuk Harris' Press Secretary Patel (evidence of D.W.2 and D.W.7) who came to D.W.7 with the press release about the alleged appointment of plaintiff. All these indicate the extent to which Datuk Harris was involved in seeing that the coalition government was successfully established.

For this to be done, it would require the entry of plaintiff into the Istana and his being appointed the Chief Minister. As to the entry, I have found that P.W.3 and P.W.4 knowingly participated in the checking in of plaintiff and his supporters, including the Berjaya group of Datuks Majid Khan and Malek Chua, and that this was also known by P.W.1. As to motive, I had observed that if the facts show this to be the case, motive is no factor showing the converse to be the true position.

I had rejected the evidence of P.W.1, P.W.3 and P.W.4 on the alleged conversations outside the office of P.W.1 and at the fish pond. I had also found that, after the swearing in, plaintiff was provided with an Istana escort which included P.W.3 and P.W.4, and that it was not made without the knowledge or instructions of P.W.1. The evidence does not indicate that the escort was provided with the knowledge of 1st defendant.

As to the circumstances after the entry of plaintiff into the Istana, leading up to his swearing in, including the arguments at the office of the Private Secretary, I had earlier dealt with these matters. I had found that the arguments were not

made by Datuks Yahya Lampong, Majid Khan and Malek Chua in support of the alleged decision of 1st defendant to appoint plaintiff; but were made for the purpose of persuading him to appoint plaintiff as Chief Minister. These arguments culminated in the matter of the giving of the "paper" to 1st defendant by Datuk Yahya Lampong, with which I had dealt.

The swearing in requires the presence of Jalil and Sukarti. As to Jalil, the unchallenged evidence of 1st defendant was that he only saw the former near the time of the swearing in; and there is no evidence to indicate that Jalil came on the order or with the knowledge, of 1st defendant. On the other hand, the evidence of D.W.8 shows that Jalil entered the Istana between 2.00 a.m. and 3.00 a.m.; and it was he who instructed D.W.14 to prepare and bring with him instruments of appointment including those relating to the Chief Minister, other Ministers, and nominated assemblymen, after previously finding out the house telephone number of D.W.14. The evidence indicates that it was also he who subsequently went to the office of D.W.14 to have a fresh and perfect instrument of appointment prepared for plaintiff; and that it was he who brought the two ladies to see 1st defendant on the evening of April 22, 1985, although the circumstances how this came about are not known.

Clearly, Jalil is a material witness, but he was not called. He would be able to give evidence in support of the plaintiff's case, in view of the allegation that plaintiff entered and was sworn in at the invitation of 1st defendant. If the plaintiff desires, Jalil could have been called after he left the service at the Istana. I consider that, in the circumstances, I should, as I have already done, apply the presumption under section 114(g) of the Evidence Act 1950 against plaintiff.

As to Sukarti, the evidence of P.W.1 shows that a message was delivered to him that Datuk Herman Luping wished to speak to him urgently about the swearing in of 2nd defendant; but P.W.1 did not state that he was asked to come to the Istana. P.W.3 deposed that he and the other close escort driver, Kassim, who was not a witness, delivered P.W.1's message, and that Sukarti indicated that he would go to the Istana. The evidence of 1st defendant shows that he saw Sukarti at about 2.15 a.m. in the Istana with a tie, but without a coat. It was not suggested to 1st defendant in cross-examination that Sukarti came to the Istana on the instructions of 1st defendant; nor is there any evidence to indicate that that was the case. Sukarti was not called. In the circumstances, I do not consider that the presumption under section 114(g) of the 1950 Act should be applied against defendants.

As to the submission of LCD that the PBS was deliberately excluded from entry into the Istana at the material time, I have accepted the evidence of D.W.8 about the fact of his conversation with Corporal Sunoh on three occasions, following closely after one another. These conversations, in the light of the whole evidence, tend to support the view that, at the time when plaintiff and his supporters and agents were at the Istana, steps were taken through Corporal Sunoh to exclude PBS from the Istana.

In the premises, I find that there is sufficient cogent evidence to conclude that there was a conspiracy to effect the entry of plaintiff into the Istana, and to have him appointed as Chief Minister; and that 1st defendant was to be persuaded to do so; also that P.W.1, P.W.3 and P.W.4 played a part in the manner found, in this conspiracy; but that the main actors were Datuk Harris, Datuk Yahya Lampong as agent of plaintiff, and Datuk Majid Khan, with lesser participation from Datuks Abdul Hamid Mustapha and Malek Chua.

As to the submission of LCD about the "contingency plan" attributed to Datuk Harris, I consider that there is insufficient evidence to make an affirmative finding, particularly bearing in mind that D.W.14 has testified that the mention of the name of Datuk Harris in the instrument of appointment concerned was made on his own initiative, and not on the instructions of Datuk Harris.

I now proceed to deal with specific legal matters raised in the defence, legal submissions forming part of the defence, and submissions made by LCP and LCD.

Letter of Appointment

The defence pleads, *inter alia*, that plaintiff was never appointed as Chief Minister as no instrument of appointment was given to him.

On the factual aspect of this matter, it was submitted by LCP that, on the evidence, the inference should be that an Instrument of Appointment was not signed by 1st defendant here. In this connection, D.W.2 testified that at about 3.30 p.m. on April 22, 1985, he saw a blancoed copy of the instrument of appointment in the Istana file. The

evidence of D.W.14 was that at about 11.30 a.m. to 12.00 noon, he saw the Protocol Officer Jalil in the office of his Personal Assistant, and he found out that Jalil had asked for a fresh copy of the instrument to be typed by his Personal Assistant. This he informed D.W.7, who corroborated his evidence. There is no evidence as to what had happened to the blancoed copies of the instrument of appointment which D.W.14 had, in the early hours of the morning of the same day, brought to the Istana at the request of Jalil. After considering the available evidence on the matter, and taking into account the respective submissions of learned counsel, I consider it more probable that the blancoed copy was not signed by D.W.1. Further, on the evidence, I find that this was so not because 1st defendant thought it was not necessary or unimportant for an appointment of Chief Minister to be made by way of an instrument of appointment, but because it was thought, by Jalil for one, that perfect copies were necessary to be prepared for signing, because plaintiff was to be given a copy in relation to his alleged appointment. In this connection, if Jalil had not considered it necessary and important, he would not have gone to have perfect copies prepared by the Personal Assistant to D.W.14.

As to the legal necessity of having an instrument of appointment, it was submitted by LCD in effect for the reasons given in his written submission, that a duly signed and sealed instrument of appointment is a legal necessity for the appointment of a Chief Minister. On the other hand, it was submitted by LCP that there is no such requirement. In this connection, he has emphasized the importance of making a literal interpretaton of the language of the Constitution, considered in the light of a comparison of other relevant written constitutions and the absence of an express requirement in the Constitution of the necessity of having a duly signed and sealed instrument of appointment. The case of *Adegbenro* v. *Akintola & Aderemi*[6] was cited in support. He has also stressed that the only requirement for a Head of State or a Chief Minister to embark on his office is the taking of the Oath, as in the case of His Majesty the Yang di-Pertuan Agong; the Prime Minister and other ministers. Further, that the absence of an express requirement in the Constitution must have been a deliberate omission on the part of its framers; that any practice of any length regarding an instrument of appointment would not create a legal requirement which does not exist under the Constitution. The point was also made that the taking of the Oath perfects the authority of the Chief Minister, but if he subsequently requires to prove his position, he is able to rely on the gazette entry relating to his appointment. In this connection, I shall deal with the "Oath" and "Gazetting" points later.

In considering this matter, certain relevant principles relating to the proper approach to the interpretation of written Constitutions should be noted:

A written constitution is "*sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation": *Dato Menteri Othman bin Baginda* v. *Dato Ombi Syed Alwi bin Syed Idrus*[7] *per* Raja Azlan Shah Ag. L.P., at page 32. The principle of interpreting constitutions "with less rigidity and more generosity" was applied by the Privy Council in *Attorney-General of St. Christopher, Nevis and Anguilla* v. *Reynolds.*[8] A constitutional instrument is "*sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law": *per* Lord Wilberforce, in *Minister of Home Affairs* v. *Fisher.*[9] This principle was followed in *Ong Ah Chuan* v. *Public Prosecutor* [10] *per* Lord Diplock. "A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language." (*Fisher's* case, page 329). "A constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way" (*Dato Menteri Othman's* case, *per* Raja Azlan Shah Ag. L.P. at page 32). In this connection, it was submitted by LCD that it has been proved that a signed and sealed instrument is necessary for the appointment of a Chief Minister as a matter of well established and usage. LCP contended otherwise. In this respect, whether in 1981, there was an instrument, signed and sealed by the then Head of State with regard to the appointment of Datuk Harris as Chief Minister has become an issue.

The evidence of D.W.2 and D.W.7, who are officials concerned with ensuring that all proper instruments relating to the appointment of a Chief Minister are prepared, executed and issued, clearly shows that as far as they are concerned, this is a constitutional requirement, and that an instrument

of appointment is required in accordance with tradition, custom or usage. However, it is for the Court to interpret the relevant constitutional provisions and decide whether, constitutionally and legally, an instrument of appointment is required.

It is not disputed that, with the exception of the appointment of Datuk Harris in 1976, all other appointments of Chief Ministers since Malaysia Day under the Constitution have been made by instruments of appointment under the State Seal, kept and used by the Head of State under Article 42 of the Constitution. There is considerable evidence on the issue as to whether there was such an instrument, in 1976, when Datuk Harris was appointed. It is clear that no copy of any such instrument is now traceable, although a lengthy search for it has been made. However, every official concerned with the preparation of the instrument, or seeing that it was prepared, executed and issued, who gave evidence expressed the view that, if there is no instrument of appointment, this would be a major mistake (per D.W.7), and a major mistake and an unforgivable one (D.W.13).

The official who was responsible for the preparation of the oath of office of Datuk Harris in 1976 was Yee Fung Chung (D.W.13). He testified that the instrument of appointment on that occasion was typed after he had finished preparing the oath of office. He said that, as he was cautioned by Datuk Harris not to repeat what the latter regarded as a mistake made by D.W.13 on the oath of office of the late Tun Fuad, Datuk Harris' predecessor, he was extra careful to do everything right on that occasion. Having prepared the instrument of appointment and oath of office, he drove up to the Istana with the documents; and he seemed to recall that he handed them to the Private Secretary to the Head of State. He only prepared 2 copies of each document on that occasion.

When asked by the Court as to how he could remember he had prepared the instrument of appointment, he stated, after referring to the tragic air accident which killed, amongst others, the late Tun Fuad:

"What happened that night was unusual. I remember unusual things more than the usual ones ..... Datuk Harris was closely in touch with me about the documents, i.e. oath of office instrument and instrument of appointment. I remember this quite well. I am sure I prepared the instrument of appointment, because I remember. I also remember I brought the instrument of appointment to the Istana."

In this connection, D.W.7 also testified that, having regard to his character, if there had been no instrument of appointment, Datuk Harris would have asked for it. Datuk Harris has not given evidence to rebut the evidence of D.W.13. I find D.W.13 to be an honest and impartial witness who gave evidence in a firm and straightforward manner. I find him to be a truthful witness, and I accept his evidence. On the evidence as accepted by me, I find that, despite no copy of it having been traced, there was an instrument of appointment for Datuk Harris in 1976. Since, as I accept, D.W.13 had brought it to the Istana together with the oath of office, and it is not disputed that the oath of office document has been subscribed by Datuk Harris, I find that the only reasonable inference to be drawn is that the instrument of appointment was signed and sealed by the Head of State. Hence, I find that there is an unbroken tradition, custom or usage that a signed and sealed instrument of appointment is required for the appointment of a Chief Minister.

But does the Constitution require a signed and sealed instrument of appointment? It was submitted by LCP that if the framers of the Constitution had intended that to be so, they would have provided for it expressly (*Adegbenro's* case) particularly having regard to express provision in this regard in some other State Constitutions, like those of Johore and Perlis; and if no such provision is made in the Constitution, as is the case, then the framers did so deliberately and advisedly. A comparison was made with the appointments of nominated members and Speaker; but in my view, it seems obvious that such appointments would have to be in writing because the Constitution requires the respective periods of their appointments to be specified; and this cannot be done without a written document.

In my view, the decision of the Head of State in appointing a Chief Minister has to be signified in some way, and, in my view, under the Constitution, this takes the form of a signed and sealed instrument of appointment, which also accords with established tradition and usage in Sabah since Malaysia Day. The instrument of appointment expresses in a formal manner the judgment of the Head of State that the person appointed has the confidence of the majority of members of the Legislative Assembly. It also evidences and signifies the finality of his choice.

Bearing in mind the relevant principles, mentioned earlier, regarding the proper approach to the interpretation of constitutions, and the importance of the subject of the appointment, as well as the tradition and usage pertaining to the appointment of a Chief Minister, I am of the view, and find, that, despite the absence of express provision in the Constitution, a signed and sealed instrument of appointment is constitutionally required for the appointment of a Chief Minister. As for the necessity of a seal, considering the fact that, apart from the Head of State, this is the most important appointment under the Constitution, the Constitution requires that it be made under the Public Seal, kept and used under Article 42 of the Constitution. This conclusion accords with the established practice, custom and tradition in other countries such as the United Kingdom. Hence, any purported appointment made without a signed and sealed instrument of appointment is not valid.

The point has been made that whereas the North Borneo Royal Instructions contained a requirement for a Letter of Appointment, the absence of such a requirement indicates that an instrument of appointment is not constitutionally required, and that the omission must have been done deliberately and advisedly. With respect, my view, based on what I have already expressed, is that the omission was made because the use of a signed and sealed instrument of appointment has been so established by tradition and usage that no express requirement was considered to be necessary. In this connection, it is common knowledge that the appointment of the Prime Minister has always been, and still is, made by instrument of appointment, although the Federal Constitution contains no express requirement for this to be done (see Article 43(1) of the Federal Constitution). In my view, this supports the conclusion at which I have arrived.

The Oath

It was submitted by LCP that the taking of the Oath is not only necessary, but sufficient to constitute a valid and complete appointment and that a letter of appointment is not required. As an example, it was stated that in the case of His Majesty the Yang di-Pertuan Agong, no letter of appointment is required. On this, it suffices to state that His Majesty is elected by his brother Rulers, and not appointed (see Article 32(1) of the Federal Constitution) and the method of election has no relevance here.

In my view, the wording of Article 8 of the Constitution is plain and clear. It stipulates that "Before a member of the Cabinet exercises the functions of his office he shall take and subscribe in the presence of the Yang Di-Pertua Negeri the oath set out in Part II of the Schedule" to the Constitution. It is my firm opinion that this wording can admit of only one interpretation, and that is that the taking of the prescribed oath is required of a member of the Cabinet *after* his appointment, and before he exercises the functions of his office. That this is so is, in my view, clear from the wording of the oath itself which commences with "I, ... *having been appointed* to the office of ....." It is clear from this wording that the Oath does not constitute an appointment made under Article 6(3), which should be read together with Article 8. Article 6(3) deals expressly with the appointment of members of the Cabinet specified in Article 6(2); whereas Article 8, with the taking of the oath by a member of the Cabinet before exercising his functions as such. In other words, the appointment precedes the taking of the oath. I need say no more.

It has been said that, if proof of the appointment of a Chief Minister is required, this may simply be done by the production of the relevant entry in the *Gazette*, of which judicial notice must be taken. As to this, I need only say that this is concerned with proof of appointment, and not with the appointment itself.

It has been repeatedly stressed that the case for the plaintiff is based on the proposition that there cannot be two Chief Ministers. However, I have already given reasons why I consider that, whether plaintiff was appointed under the Constitution is an issue I have to try.

In the premises, I find that, the taking of the oath by plaintiff without a signed and sealed instrument of appointment does not suffice to constitute an appointment made under Article 6(3) of the Constitution. It follows that I find that there has been no valid appointment of plaintiff made thereunder.

The "Gazetting" Point. The meaning and effect of section 5 of the Chief Minister (Incorporation) Ordinance (Cap. 23)

Section 5 of the above Ordinance provides as follows:

"A notification in the *Gazette* of the appointment of any

person to hold or act in the office of Chief Minister, State of Sabah, shall be conclusive evidence that such person was duly so appointed."

It was submitted by LCD that that section goes much further than section 57(1)(h) of the Evidence Act, 1950, which merely requires the Court to take judicial notice of the fact of

"the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of Malaysia, if the fact of their appointment to such office is notified in the *Gazette*."

It was further submitted that that section also goes much further than section 54 of the Interpretation and General Clauses Enactment, 1963, the provisions of which read:

"Any printed copies of the *Gazette* purporting to be published by authority and to be printed by the Government Printer shall be admitted in evidence in all courts and in all legal proceedings whatsoever without any proof being given that such copies were so published and printed, and shall be taken and accepted as prima facie evidence of the proclamations, regulations, orders, appointments, notifications and other publications therein printed, and of the matters and other things contained in such proclamations, regulations, orders, appointments, notifications and publications respectively."

The following points in the construction of section 5 were made by LCD:

(1) That a notification in the *Gazette* of any person to hold or act in the office of Chief Minister is, unlike a notification of appointment to any other offices, to be "conclusive evidence" that such person was "duly appointed".

(2) That "duly appointed" in section 5 means duly appointed by the Yang di-Pertuan Negeri in exercise of the powers conferred by Article 6(3) of the Constitution of the State of Sabah.

(3) That the effect of section 5, in the circumstances of this case, is that the plaintiff is able to circumvent or displace section 5 if, and only if, the plaintiff were able to prove that 2nd defendant's appointment by 1st defendant, or the subsequent notification in the Gazette, was unconstitutional, *ultra vires* and void, whether by reason of fraud, duress, or other illegitimate pressure or undue influence, contrary to the well-known public law principles of legality, rationality and procedural propriety.

On the other hand, LCP has submitted that the expression "duly so appointed" in section 5 merely means that all proper formalities were complied with; and does not mean "lawfully appointed"; that, if this is not the case, then a purely procedural provision would override many vital questions of constitutional propriety. Further, that this is necessarily conceded by LCD in the third point made in his construction of section 5 set out in the preceding paragraph.

It was also submitted that the words "conclusive evidence" add nothing to the general law under the Evidence Act, 1950, and sections 56 and 57 of that Act were cited, under which provisions, it is said, the validity of the appointment to the offices mentioned therein is always open to question. Finally, it was submitted that the effect of section 5 is procedural only.

In my view, the starting point to consider section 5 is whether it is an "evidential" or a "procedural" provision. In my view, by the nature of its provision, considered in the light of the long title to the Ordinance and its other provisions, it seems clear that the provision in section 5 is more in the nature of an evidential provision. It is apparent that it is primarily designed to dispense with the need of the proof of the appointment of "any person to hold or act in the office of Chief Minister, State of Sabah", upon production of a notification in the *Gazette* for the purposes of the Ordinance. I have not been addressed arguments as to whether the provision should be considered as being more extensive in scope than this and I proceed on the basis that it may be regarded to be so. But what does "conclusive evidence" mean in the provision? In this regard, it is observed that section 4(3) of the Evidence Act, 1950 provides that "When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it." LCD has submitted that section 5 should be read with this provision, and so read, section 5 states that the notification of 2nd plaintiff being appointed as Chief Minister is conclusive that he has been duly so appointed; and section 4(3) of the 1950 Act does not allow evidence to be given for the purpose of disproving that fact. However, with respect, it must be pointed out that, for section 4(3) of the 1950 Act to apply, the "conclusive evidence" must have been declared by that Act, and not by the Chief Minister (Incorporation) Ordinance. This is the clear wording in section 4(3) of the 1950 Act. Hence, in my opinion, the provisions of that sec-

tion do not apply for the interpretation of section 5 of the Ordinance.

In my view, for a proper interpretation of that part of the provisions of section 5 under discussion, the phrase "shall be *conclusive evidence* that such person was *duly appointed*" needs to be considered, particularly the words emphasised, bearing in mind the primary purpose for which the provision was enacted, as mentioned above. So construed, I have reached the conclusion that the "conclusive evidence" in section 5, refers to the fact, together with any procedural requirements, of the appointment, as distinct from the conclusiveness of the validity of the appointment itself, so as to bar any challenge of the legality of the appointment. If this is not so, then, with respect, I am unable to understand the concession made by LCD in the third point of his construction of section 5 above, as the contrary view would surely mean that no evidence whatsoever, be it for the purpose of proving that the Head of State's decision to appoint 2nd defendant was a nullity or not, may be produced to challenge the legality of the appointment referred to in section 5. Accordingly, I find that this provision does not have the effect of shifting the burden of proof.

Section 29(3) of the Interpretation and General Clauses Enactment, 1963

The defence pleads that, by virtue of the above provision, 1st defendant can dismiss plaintiff, and lawfully did so by reason of the facts and matters pleaded in the defence.

The relevant part of section 29(3) of the 1963 Enactment provides:

"Where any State law confers upon any authority or power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to dismiss ..... any person appointed ...."

At the outset, I would observe that, whatever the facts and circumstances, the real point to consider is whether, in this instance, this provision confers any power at all on 1st defendant to dismiss plaintiff. In this connection, if the appointment of plaintiff is valid, I do not consider that the use of the word "dismiss" or that of "revoke" makes any difference, insofar as reliance is placed upon this provision to cause plaintiff to vacate his office as Chief Minister.

The submission of LCD is primarily based on the interpretation of Article 7 of the Constitution; although, in relation to his submission that 1st defendant has the power to dismiss a Chief Minister for reasonable cause, the case of *Thomas* v. *A.G. of Trinidad & Tobago*[11] was also relied on.

Article 7 of the Constitution provides:

"(1) If the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the Yang di-Pertua Negeri dissolves the Assembly, the Chief Minister shall tender the resignation of the members of the Cabinet.

(2) A member of the Cabinet may at any time resign his office by writing under his hand addressed to the Yang di-Pertua Negeri, and a member of the Cabinet other than the Chief Minister shall also vacate his office if his appointment thereto is revoked by the Yang di-Pertua Negeri acting in accordance with the advice of the Chief Minister.

(3) Subject to clauses (1) and (2), a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di-Pertua Negeri."

It was submitted that Article 7 should be construed to mean that –

(1) The Head of State may revoke the appointment of a Chief Minister before he has received the approval of a majority of the Legislative Assembly;

(2) The Head of State has power to remove a Chief Minister from office or to dismiss him for reasonable cause, and one example given is the case where the Chief Minister has acted contrary to his oath as a member of the Legislative Assembly to preserve, protect and defend the Constitution. This is subject to the proviso that the Head of State does not do so merely because he considers that the Chief Minister no longer commands the confidence of a majority of the members of the Assembly, which the case of *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli* has held he is not permitted to do.

In connection with the above submission, it was contended that the *Ningkan's* case (*supra*) should be confined to its particular facts; that it does not apply to a case in which the Head of State seeks to remove a Chief Minister from office for cause, before the Chief Minister has received a vote of confidence from the Legislative Assembly; and alternatively, that if the *Ningkan's* case purported to decide that there is no power to revoke or to dismiss the appointment of a Chief Minister, in the circumstances of this case, then it was wrongly

decided. Here, I consider the expression "in the circumstances of this case" as falling within the ambit of the ground of "reasonable cause".

Reading and examining the grounds of judgment in the *Ningkan's* case, I do not, with respect, consider that the decision in that case is confined to the narrow sphere of its own particular facts. From the judgment, it seems clear that the whole spectrum in the provisions in the Sarawak Constitution corresponding to Article 7 of the Constitution and section 29(3) of the 1963 Enactment was argued and considered by the Court, in connection with its decision. With great respect, I do not seek to differ from that decision.

As to the above arguments that Article 7 should be construed to mean that the Head of State may revoke the appointment of a Chief Minister before the latter has received the approval of the majority of the Legislative Assembly, and may remove him from office or dismiss him for reasonable cause, it is to be observed, in relation to the second argument, that the learned Acting Chief Justice, in the *Ningkan's* case, after hearing arguments on the corresponding Sarawak Article 7 and section 21 of the Interpretation Ordinance, decided as follows (at page 194, para. 2):

"Of course, if the Sarawak Constitution lays down that a Chief Minister may not be dismissed at all, then the defendants have no case and the Interpretation Ordinance cannot apply. The Sarawak Constitution does in fact direct in article 7(3) that all Ministers other than the Chief Minister hold office at the Governor's pleasure. According to Mr. Le Quesne this means that Ministers other than the Chief Minister may be dismissed "at the Governor's pleasure", whereas the Chief Minister may only be dismissed for cause. If the cause for dismissal is limited to the case of an adverse vote, then this interpretation does not help defendants. In my view, however, the suggested interpretation is altogether false. *Article 7(3) clearly means that the Governor may dismiss Ministers but may not dismiss the Chief Minister in any circumstances*" (emphasis added).

However, even on the basis that the matter is *res integra*, I have reached the same conclusion. In this connection, reading Articles 6(3) and 7 of the Constitution together, it seems clear that, whereas the power of appointment is vested in the Head of State alone, who makes his own judgment in this respect, without having to be advised by the Cabinet or anyone else, his power of revocation of appointment and dismissal is solely conferred by Article 7(2) and (3); and, in this regard, as distinct from members of the Cabinet other than the Chief Minister, the latter does not hold office at the pleasure of the Head of State. In this regard, if it is intended that the Head of State should have a limited power of revocation of appointment or dismissal, provision in the Constitution would clearly have to be made. As to the argument that Article 7 should be construed to mean that the Head of State may revoke the appointment of or dismiss a Chief Minister before the latter has the approval of the majority of members of the Legislative Assembly, this, in my view, would run counter to what I consider to be the intention of the Constitution that, after his appointment, the Chief Minister has the legal constitutional right to go to the Legislative Assembly, to be tested whether he in fact commands the confidence of the majority members thereof. Revoking his appointment before he has an opportunity of exercising that right, in my opinion, is contrary to the constitutional intention, and this is not permitted by the Constitution. Even more so, would this situation apply in the case of dismissal without a vote of no confidence from the House. In other words, I am of the view that, once a valid appointment of a Chief Minister has been made by the Head of State, he has no power of dismissal, and this is the "contrary intention" provided for in section 29(3) of the 1963 Ordinance. But what about removal or dismissal for reasonable cause? There is no provision on this in the Constitution. Is it a proper construction of the Constitution to conclude that a power of removal or dismissal for cause should be implied? In this connection, it is to be observed that "reasonable cause", or "for cause" may be considered both under the subjective or objective tests. In my view, it seems clear that, by the absence of express provision in the Constitution giving any power of removal from office or dismissal, the Constitution does not intend that any such power be given to the Head of State; otherwise it would have expressly said so, as in the case of members of the Cabinet other than the Chief Minister. As distinct from the Indian position, I consider that the scheme of the Constitution is such that if a Chief Minister misconducts himself or there are other circumstances giving rise to reasonable cause for the removal of a Chief Minister, it is left to the good sense and responsibility of the Assembly to pass a vote of no confidence against him, and, in the normal case, Article 7(1) requires him to either request the Head of State to dissolve the Assembly, or tender his resignation and that of other members of his Cabinet. In reaching this conclusion, I have borne in mind the relevant principles relating to the proper interpretation of constitutions which I had earlier referred to. Further, "the only true guide and the only course which can produce stability in

constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning" (*per* Barwick, C.J. in *A.G. of the Commonwealth ex relatione McKinlay* v. *The Commonwealth of Australia*[12]).

It was also submitted that, by virtue of a term implied into the public law relationship between the Head of State and the holder of the office of Chief Minister, the Head of State has the power to remove from office or to dismiss a Chief Minister for reasonable cause. In this connection, an analogy is made with the position where such term is implied into a contract of employment, as shown in the case of *Thomas* v. *A.G. of Trinidad & Tobago*. The facts and issues for determination in that case, as set out in the headnote, reads:

"Section 99 of the Constitution of Trinidad and Tobago provides:

'(1) Power to appoint persons to hold or act in offices in the police force (including appointments on promotion and transfer and the confirmation of appointments) and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Police Service Commission: provided that the commission may, with the approval of the Prime Minister and subject to such conditions as it may think fit, delegate any of its powers under this section to any of its members, or to the Commissioner of Police or any other officer of the police force.'

Section 102 provides:

'(1) Subject to the provisions of subsection (3) of this section (the Police Service Commission) may, with the consent of the Prime Minister, by regulation or otherwise regulate its own procedure, including the procedure for the consultation with persons with whom it is required by this Constitution to consult, and confer powers and impose duties on any public officer or on any authority of the Government of Trinidad and Tobago for the purpose of the discharge of its functions. (2) Without prejudice to the generality of the powers conferred by subsection (1) of this section (the commission) may by regulation make provision for the review of its findings in disciplinary cases ... (4) The question whether – (a) (the commission) has validly performed any function vested in it by or under this Constitution; (b) any member of (the commission) or any other person has validly performed any function delegated to such member or person in pursuance of the provisions of section 84(1), or section 93(1), section 99(1), as the case may be, of this Constitution; or (c) any member of (the commission) or any other person has validly performed any other function in relation to the work of the commission or in relation to the work of the commission or in relation to any such function as is referred to in the preceding paragraph; shall not be inquired into in any court.'

The plaintiff was a police officer in the Trinidad and Tobago police force. In 1972 he was charged with three offences against discipline. Each of the charges specified that he had been guilty of neglect of duty contrary to regulation 74(2)(d) of the Police Service Commission Regulations 1966 and gave particulars of the offence alleged. The Police Service Commission, purporting to act under regulation 99 of the Regulations of 1966, dismissed the plaintiff from the police force. He brought an action against the Attorney-General in the High Court claiming a declaration that he was still a member of the police force or that he had been wrongfully dismissed and was entitled to damages. In the High Court Majaraj J. certified three preliminary questions of law for the consideration of the court, namely, whether the offences with which the plaintiff had been charged were validly created by the Police Service Commission Regulations 1966, whether the plaintiff's action was maintainable in view of sections 99 and 102 of the Constitution, and whether the plaintiff was a Crown servant dismissible at pleasure."

The appeal of the appellant to the Privy Council was dismissed. The relevant part of the decision of the Privy Council, as set out in the headnote, reads:

"(3) That in the absence of a comprehensive code of conduct embodied in the Police Service Act 1965 or in regulations made lawfully under the Act, the only misconduct that the plaintiff could have been charged with was wilful neglect or breaches of duties imposed upon him by implied terms of his contract of employment; that, since the charges did disclose such misconduct and the plaintiff could not have been misled as to the nature of the charges by the references to regulation 74 of the Police Service Commission Regulations 1966, the references to regulation 74 were to be treated as surplusage and did not invalidate the commission's imposition of the penalty under regulation 99 of removing him from the police service (post, p. 616G-H).

(4) That in the absence of an allegation that the commission had acted outside its jurisdiction or had contravened the right of an individual to a fair hearing secured by section 2(e) of the Constitution, section 102(4) of the Constitution excluded a court from inquiring into whether the commission had validly performed its functions and, therefore, the High Court had had no jurisdiction to entertain the plaintiff's claim (post, p. 618F-H)."

Although the case was concerned with the construction of the relevant provisions of the Constitution of Trinidad and Tobago, it relates to a contract of employment between the appellant and the Police Force of that country. With respect, I do not consider that that case is authority to support the proposition that a term of power of removal from office or dismissal should be implied into the public law relationship between the Head of State and the holder of the office of Chief Minister, since it was concerned with a contract of employment. Further, to do so would be to override the intention of the Constitution and let in by a side or backdoor a power to the Head of State which the supreme law in the State does not confer upon

him. With respect, this argument cannot be accepted.

As to the case of *Adegbenro* v. *Akintola and Aderemi,* that case has been much canvassed and dealt with in the *Ningkan's* case (*supra*). As rightly indicated by LCP, the actual decision in that case regarding the power of dismissal is inapplicable here, as the wording in the Constitution of Western Nigeria, on the interpretation of which the decision in that case turns, is different from that in the Constitution here.

In the premises, I am of the opinion that, in a case where the appointment of a Chief Minister has been validly made, there is no power for the Head of State to either revoke such an appointment, or to dismiss the Chief Minister.

In reaching this conclusion, it need hardly be mentioned that, in my view, the Indian cases on removal from office or dismissal of Chief Ministers are not relevant, as the corresponding Indian constitutional provisions are different. There, the Chief Minister holds office "at pleasure".

Constitutional Conventions

The submission of LCD is as follows:

(1) The traditions and usages in the State of Sabah, about the appointment of the Chief Minister, under Article 6(3), are based upon a constitutional convention (set out in the next paragraph) which the Court should recognize when interpreting and applying Article 6(3) in the circumstances of the present case. The Court is not asked to hold that the convention has amended Article 6(3), nor is the Court asked to enforce the convention. The Court is asked to recognize that the convention exists as an aid for and background to the constitutional construction.

(2) The convention which is binding in character is to the following effect: if, as a result of a general election, there is in the legislature, or, in the case of a bicameral legislature, in the lower House thereof, a party with a majority of the seats (that is to say, more than half the seats filled by that general election), and that party has, in accordance with its own constitution, a leader, and there is a vacancy in the office of Prime Minister or Chief Minister, the Head of State must select the leader of the majority party to be the Prime Minister or Chief Minister.

In considering this submission, it has to be borne in mind that, as distinct from an unwritten, or partly unwritten, constitution based on the Westminster model, we are here dealing with the interpretation of a wholly written constitution based on that model; and further, as distinct from the great majority of States comprising Malaysia, the Constitution here provides for the existence of nominated members.

It is further submitted that the Court should take judicial notice of the existence of this convention, as a fact to be judicially recognized under sections 56 and 57 of the Evidence Act, 1950, because the existence of this convention is undisputed and notorious. The Canadian case of *Reference Re Amendment of the Constitution of Canada,*[13] was referred to, and passages therein quoted in support of the submissions of LCD. I agree, with respect, that that case establishes the proposition that, if the Court finds that a relevant convention exists, the Court may recognize its existence as an aid for and background to constitutional construction. In this connection, reference may be made to the evidence of Professor Lionel Astor Sheridan (P.W.17) who has helpfully produced certain relevant extracts from some notable legal publications, relating, *inter alia*, to the convention set out above, of which the defence seeks the Court to take judicial notice as an aid for and background to the interpretation of the relevant provisions of the Constitution here. However, it is to be noted that none of the authorities produced deals with such a written constitution as one under which nominated members exist. However, we are here concerned primarily with the interpretation of the Constitution, particularly Articles 6(3), 7, 8, 10(1) and (2), and 14 thereof. It is only where the Court considers that external aid is necessary for such purpose that it will become necessary to consider whether such a constitutional convention as is submitted, exists as an aid for and background to constitutional construction here. In the view which I take with regard to this matter on which I shall elaborate later, it has not become necessary for me to do so. However, in deference to the submissions of LCD, ably argued, I shall continue to deal with his submissions. As stated, the existence of nominated members here, distinguishes the Constitution here from other constitutions, unwritten, or partly, or wholly written, based on the Westminster model without such members. Hence, I am of the view that any constitutional convention under a wholly elected legislature in this regard is not such a convention of which the Court should take judicial

notice, so as to recognize its existence as an aid for and background to the interpretation of the relevant provisions of the Constitution.

The alternative submission of LCD is that the existence of the convention is proved by answering the three questions raised by Sir Ivor Jennings in "The Law and the Constitution" (5th Edn., 1959, page 136), and adopted by the majority judgment of the Supreme Court of Canada in *Reference Re Amendment of the Constitution of Canada* (*supra*) namely:

> "We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule. A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them(selves) as bound by it."

As considered here, the "rule" is, of course, referrable to the convention as set out in the submission of LCD. I shall deal with the three questions posed by Sir Ivor Jennings in the reverse order. In my view, the answer to the third question posed is obvious: the reason here for the rule is the democratic parliamentary principle under a party system of government that "it is a government of the people, for the people, and by the people", where the choice of the majority as to the representatives to represent and govern them, prevails. With regard to the second question, on the assumption that there are precedents as envisaged, the actors here are the parties to this action. From their own evidence, the defendants clearly considered themselves bound. But does this apply to plaintiff? In this connection, reference may be made to the "*Asiaweek*" article (Ex. D36), last paragraph. It has been pointed out by LCP that the accuracy of this paragraph is open to grave doubts, having regard to, *inter alia*, the inaccuracies as to times and facts. However, on this, I am inclined to accept the evidence of Assif Shameen (D.W.3) who has testified that he has made a note of his interview with plaintiff, and checked them against a tape recording of that interview; and that what was contained in that paragraph is essentially correctly reported of what plaintiff stated at that interview. In my view, there may be certain inaccuracies as to time, events and the sequence of events given by plaintiff in that interview; but reading that paragraph as a whole, in the light of the evidence here, I have reached the conclusion that, on material matters concerned in this case, the facts, as reported, of that interview, are essentially correct. By his statement "How are we going to form the government? It is USNO 16, Berjaya 6, PBS 26", it seems clear that plaintiff considered himself bound by the democratic principle mentioned earlier. Hence, this in my view justifies an affirmative answer to the second question. As to the first, and no less important question as to "what are the precedents", it is to be borne in mind that, as expressed in the same paragraph containing the three questions, a single precedent with a good reason may be enough to establish the rule. Considerable time has been spent, evidence given and arguments made on this question. The arguments were centered on item 2 in Ex. D15B which is a list headed "Heads of State, Chief Ministers, Political parties, elections and results". I do not propose to deal at any length with the arguments in this respect, as I consider on the evidence and taking into account the figures given on the election results of 1967 given in the said item 2, that no precedent has been established thereby showing the existence of such a convention as submitted. In that election, there was no outright majority, the results being as follows: Independent 1; Sabah Chinese Association (SCA) 2; Sabah Alliance 3; UPKO 12; and USNO 14. The Constitution provided for 32 elected seats. The factual position, on the evidence, was that a coalition government was formed comprising USNO (14), SCA (2) and Sabah Alliance (3), making a total of 19 elected seats, which is a majority. It is not in evidence as to how the coalition arose. Even taking into account the different permutations featured in the arguments, the fact remains that this item establishes no precedent giving rise to the convention as contended for, particularly as no party had secured a majority. Hence, I had reached the conclusion that the answer to the first question should be in the negative.

In the premises, the submission of LCD on the use of the convention stated as an aid for and background to the interpretation of the Constitution here cannot be accepted.

Nominated members. Can they be taken into account, constitutionally, in making an appointment under Article 6(3)?

The state of the Parties on April 22, 1985 was as follows: PBS (26); USNO (16); and Berjaya (6). Under the Constitution, the number of elected seats is 48. If nominated members may constitutionally be included, this would bring the total number of seats for the purpose of making an appointment under Article 6(3) to 54. Whereas

the defence pleads and submits that, for such a purpose, only elected seats may be constitutionally taken into account, plaintiff pleads and contends that nominated seats may be constitutionally included. If the submission of the defendants is correct, then it follows that 1st defendant could not have constitutionally and validly appointed plaintiff, as a coalition of USNO of which he is the elected leader, and Berjaya, does not produce a majority, and hence 1st defendant cannot be said to have made a judgment in accordance with Article 6(3) in that he cannot be said to have been satisfied thereunder that the plaintiff commands the confidence of a majority of the members of the Legislative Assembly. On the state of the parties as above mentioned, it is obvious that the Head of State, could not have made his judgment under Article 6(3) without taking into consideration the nominated members for the purpose of satisfying himself that the USNO-Berjaya coalition headed by plaintiff, commands the confidence of the majority of the members of the Legislative Assembly. If the defence is correct, any such judgment made would therefore be unconstitutional, illegal and void; and any appointment of plaintiff as Chief Minister in such circumstances would be no appointment, and equally null and void. One thing is clear, the Head of State may only make his judgment and appoint a Chief Minister in accordance with the provisions of Article 6(3), considered in the light of any other relevant constitutional provisions. He is not permitted to make an appointment contrary to, or not in compliance with, such provisions. As to other relevant constitutional provisions in connection with the matter, it is necessary to consider –

Articles 10(2), 6(3), 7(1) and 14(1) of the Constitution.

In construing these Articles, I need hardly reiterate that I bear in mind the relevant principles relating to the approach in constitutional construction set out earlier.

Article 10(2)(a) provides that the Yang di-Pertua Negeri may act in his discretion in the performance of his functions in the appointment of a Chief Minister; and the relevant provision in Article 6(3) stipulates that he shall appoint as Chief Minister a member of the Legislative Assembly who in his judgment is likely to command the confidence of a majority of the members of the Assembly.

In construing the above Articles, LCP has adopted the literal and grammatical approach.

It was submitted that under Article 6(3), the "judgment" of the Head of State is, by virtue of Article 10(2), confided solely in him; and cannot be scrutinised or reviewed by the Courts. In this respect, I would observe that this may be accepted to be so, provided that the constitutional validity, as distinct from the propriety, of the judgment is not called in question. In the former case, by virtue of the authorities to which I had referred earlier, it is the function of the Court to examine the evidence in order to decide whether, in making his judgment, the Head of State had acted contrary to, or not in compliance with, Article 6(3). As stated earlier, Article 6(3) does not authorize the Head of State to act outside the relevant constitutional provisions. In my view, the submission of LCP is too wide and cannot be accepted.

It was also submitted that the words "... is likely to command the confidence of a majority of the members of Assembly", in Malaysian jurisprudence, refer to and mean a majority of the members of the Assembly actually sitting and voting; that this meaning is established in the *Ningkan's* case (*supra*) in relation to dismissal, and as the phrase considered in that case which is the same as that in Article 7(1), is identical to the one contained in Article 6(3), they should bear the same meaning. In this connection, it should, in my view, be borne in mind that, although the same phrase appears in Article 6(3), that article is solely concerned with the power conferred upon the Head of State to make his judgment of appointing a Chief Minister; it has nothing to do with the powers and functions of the Legislative Assembly with which Article 7(1) is concerned. In my opinion, there is nothing in the Constitution to justify the view that, in making his judgment, the Head of State is expected, or it is a relevant consideration with him, to take into account how the voting would go, or is likely to go, in the Legislative Assembly. He is solely concerned, under Article 6(3), with making his own judgment on the material which he considers relevant to take into account, subject to considerations which are not unconstitutional. I consider that the decision in the *Ningkan's* case is no authority for the proposition that what was decided in that case must necessarily apply to the construction of the words mentioned above, in relation to Article 6(3). The *Ningkan's* case was concerned with the confidence of the Chief Minister by members of the Legislative Assembly, and it was decided that the expression of no confidence should be by way of a vote in the House, I fail to see any connection with the method of the expression of the will of members

of the Legislative Assembly, with the way in which the Head of State makes his judgment. Why should he be concerned with predicting how members of the Legislative Assembly should vote on his choice of Chief Minister, since this would indicate that an assessment as to how the Legislative Assembly would view his judgment is an influencing factor to be taken into account. As submitted by LCP, the Head of State has unfettered discretion – a discretion which should not be fettered or influenced by considering how the Legislative Assembly would view his selection of a Chief Minister. I am not attracted by this submission.

It was further submitted that the phrase "is likely to ..." in Article 6(3) logically and grammatically always imports an element of futurity and prediction. However, the authorities to which I have referred earlier clearly show that constitutional construction does not necessarily mean accepting the ordinary rules and presumptions of statutory interpretation, and that it calls for its own principles of interpretation, suitable to its character: *Dato Menteri Othman's* case (*supra*), *Fisher's* case (*supra*), and what should be borne in mind is that a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way: *Dato Menteri Othman's* case (*supra*); and that the language of the Constitution to be construed must be read as a whole, generously and not pedantically, in order to find its meaning by legal reasoning: *A.G. of Commonwealth, ex relatione McKinlay* v. *The Commonwealth of Australia* (*supra*).

In this regard, the material words in Article 6(3) are "... is likely to command the confidence of a majority of the members of the Assembly." Bearing in mind the relevant principles regarding the proper approach to constitutional construction, I am of the opinion that the words "is likely" here, as opposed to what was contended by LCP, connote the time when the Head of State makes his judgment, and at that time, the only existing members of the Legislative Assembly are those who have been elected after a general election. In my opinion, this view is supported by taking into account the position at that same time, as contemplated by the Constitution, that none of the nominated members are yet in existence; nor is it certain then that they will be appointed; and if so, how many will be appointed by the Head of State on the advice of the Cabinet yet to be formed. Any such appointment cannot constitutionally be made until a Cabinet is formed, and that cannot constitutionally happen at the time the appointment of a Chief Minister is made, as the provisions of Article 6(2) and (3) clearly show. I am not attracted by the argument that here, the evidence indicates that six instruments of appointment of nominated members have been signed by 1st defendant, as for one thing, his evidence was that he did not do so willingly and voluntarily; and further, he had kept back those instruments. I am also not attracted by the contention, in effect, that the appointments are more or less a formality, since the nominations are in effect those of the Chief Minister, and it would be exceptional and extraordinary for the other members of his Cabinet to disagree with his choice. As to this, the legal constitutional position remains that, until a Cabinet is formed, no account could, in my opinion, constitutionally be taken into account by the Head of State for the purpose of making a judgment under Article 6(3); and if he does so, then it follows that his judgment is not made in accordance with the requirements of that Article. It has been stated above that, in appointing plaintiff, having regard to the state of the parties at the time of appointment, and on the basis that an appointment has been made by 1st defendant, he must necessarily have made his judgment after taking into account the six nominated members who, at the time of appointment, had not yet come into existence. For the reasons given, this in my opinion the Constitution does not permit him to do; and hence any appointment made by him in such a manner would be contrary to what Article 6(3) intended and requires, and would therefore not be a valid appointment.

It was submitted that "members of the Assembly" in Article 6(3) must bear the same meaning as given by Article 14, which includes nominated members as members of the Assembly, otherwise the framers of the Constitution would have excluded them from Article 6(3) (*Adegbenro's* case (*supra*)). Further, that there is absolutely nothing in the Constitution to suggest that "members" in Article 6(3) is confined to elected members; but on the contrary there is everything in the Constitution to suggest that the word "members" is not so confined. In this regard, mention has been made to the history regarding nominated members. In my view, the answer is given in the preceding paragraph. To my mind, the framers of the Constitution have not found it necessary to expressly exclude nominated members because at the time when the Head of State is to make his judgment, no nominated member is yet in existence, nor can they constitutionally come into existence, and to exclude them in Article 6(3) would be superfluous and unnecessary. This view

accords with what a general election under a party system of government is intended to achieve, and that is that the majority who is elected by the electorate should form the government, and is the government of their choice. The converse view would mean that the will of the electorate, expressed through the ballot box, would be frustrated; a result which was, in my opinion, never intended by the Constitution. Nor, for the same reasons, do I consider that the Constitution permits the use of nominated members to inflate the seats of a party with a minority of elected seats in order to obtain a majority, additionally, for the reason that, at the time of appointment, no nominated member is yet in existence. It is a matter of satisfaction that I am able to arrive at this conclusion, on what I consider to be the proper construction of the relevant provisions of the Constitution, in accordance with the relevant principles on the appropriate approach to constitutional construction, as shown by the authorities mentioned. In my opinion, this conclusion also accords with what I consider to be the real intention of the Constitution, based as it is on the party system of democratic government.

Finally, reference was made to the proviso to Article 6(3). It was submitted that the proviso does two things:

(a) The considerable freedom of the Head of State in "judging" and appointing.

(b) The importance, under the whole Article, of what is to happen at the sitting of the Assembly.

As to this submission, it should be pointed out that, in my view, the proviso is solely concerned with what is commonly described as a "caretaker" government. I do not consider that the provisions regarding such a caretaker government bear any material relationship to the construction of the provision regarding the appointment of a Chief Minister after a general election, as is concerned in this case.

For the reasons given, I am of the opinion that the Head of State may not constitutionally take into account any nominated member for the purpose of making his judgment in the choice of a Chief Minister; nor can he constitutionally take any of them into consideration for the purpose of inflating the seats of a party having a minority of elected seats, in order to secure a majority over the party with the majority of elected seats. If he does so, such a judgment would not be in accordance with the requirements of Article 6(3) of the Constitution.

It is said that "members of the Assembly" in Article 6(3) must bear the same meaning as they are regarded as such under Article 14(1) because, for instance, their power to vote under Article 7(1) is recognized, and it is not a correct view for them to be considered as members in one Article, but not in the other. As to this, I consider that, having regard to the general scheme in the constitutional set-up under the Constitution, in which nominated members only come into being subsequent to the formation of the Cabinet, and to the judgment of the Head of State under Article 6(3), this view on a true construction of the Articles concerned is the correct one. Indeed, this view may possibly be regarded as support for the contention, advanced on behalf of defendants, that the provision on nominated members is primarily intended that appointments should be made from communities who are not, or not adequately, represented in the Legislative Assembly.

I do not propose to deal with the arguments on whether the Speaker is a member of the Legislative Assembly as I do not consider it necessary to do so for the purpose of this judgment, and any views I may express thereon would therefore necessarily be *obiter*.

I would say a word about the case of *Adegbenro* v. *Akintola and Aderemi* (*supra*). It was heavily relied on by LCP in his submission on various issues. In my view, for the purposes of this action, that case should be considered in the light of other relevant cases, already mentioned, regarding constitutional construction. I would observe that that case does not appear to lay down that in constitutional construction, the literal approach should be adopted as a general principle applicable to all cases of a similar nature. Thus, in his judgment, Viscount Radcliffe (at page 71, last para.) recognized that the literal approach was applied in that case because there were no compulsive reasons to be found in the context of the Constitution of Western Nigeria or to be deduced from obvious general principles, to justify a departure from it. Further, that case was primarily concerned with deciding a question of obvious importance which, nevertheless, lies within a very small compass; and that its decision turns upon the meaning to be attached to the wording of section 33(10) of the Constitution of Western Nigeria, read in the context of any other provisions of the Constitution that may legitimately influence its meaning.

Paragraph 28A of his re-amended defence contains the alternative plea of 2nd defendant. As rightly pointed out by LCD, it would be necessary for the Court to consider this alternative plea that, in purporting to appoint plaintiff, 1st defendant acted *ultra vires,* contrary to the principles of legality, rationality, and procedural propriety, only if the Court finds that 1st defendant had validly appointed plaintiff as Chief Minister. Since the Court has found this not to be so, I do not propose to deal with this alternative defence of 2nd defendant, although I had, in effect, alluded to it earlier.

For all the reasons given, I find that the claim of plaintiff fails. His claim is dismissed with costs. Certificate for two counsel for each defendant.

In the course of his submissions, LCP has applied for a special order of costs in the cause to be awarded to plaintiff, in connection with the calling of Professor Sheridan (D.W.17) by the defendants. No arguments have been addressed to me in connection with this application. It seems obvious that D.W.17 had been called as an expert witness, and it was only after some arguments and a ruling by the Court that his evidence as such was not presented, and his evidence was confined to the production of extracts from notable legal publications resulting from his research on the issue of constitutional conventions. In the circumstances, and as at present advised, I do not feel inclined to make the order as to the costs applied for by plaintiff. However, if plaintiff wishes to pursue his application, another date will have to be fixed to hear arguments thereon.

I cannot leave this case without making some observations.

As to the Head of State (D.W.1), I have found that, despite the mistakes, inaccuracies, inconsistencies and contradictions in his evidence, he is essentially a truthful witness who had stood up well in lengthy, intensive and strenuous cross-examination, and his credibility remains unaffected, after considering his evidence in the light of the whole evidence.

As disclosed by the evidence in this action, the events which occurred at the Istana in the early hours of April 22, 1985 for the duration of some hours, ending at about 7.00 a.m., were those which all right-thinking members of the citizens of this beloved democratic country of ours would most certainly never have dreamt of their ever happening, much less expect that they would ever occur – but yet they had materialised. They have undoubtedly brought great shame and dismay to all responsible citizens who sincerely believe in the principles of parliamentary democracy practised in our country. What happened is a blatant travesty of this belief. It is to be hoped that events of such nature will never ever surface again. The Head of State must be allowed to make his judgment quietly, independently and in a dignified manner, as intended by the Constitution.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar; Rayner & Co.; Skrine & Co.*